Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JIMMY DOUG SHELTON,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Government can obtain valid consent to search a third-party's property from one of its own agents, when that government agent's "common authority" over the property to be searched had been given to her in her capacity as a private citizen?

II.

Whether searches conducted by a private party who is acting as a government agent are subject to the warrant requirement of the Fourth Amendment, when that private party would otherwise have the right to conduct such searches?

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

1. Jimmy Doug Shelton, petitioner;
2. Willie Sue Carnathan, a defendant in the district court, but not a party to this petition;
3. Jonathan Shelton, a defendant in the district court, but not a party to this petition;
4. Lindon F. Baker, a defendant in the district court, but not a party to this petition; and
5. The United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jimmy Doug Shelton respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 8, 2003, to address the important questions of federal law presented herein, and to resolve the conflict among the federal Courts of Appeals on the questions raised by this proceeding.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which gives rise to this petition is *United States of America v. Jimmy Doug Shelton*, 337 F.3d 529 (5th Cir. 2003). (App., *infra*, pp. 1a-20a). The district court's order denying petitioner's motion to suppress evidence (App., *infra*, pp. 21a-38a) is reported as *United States v. Shelton*, 181 F. Supp. 2d 649 (N.D. Miss. 2001). The report and recommendation of the United States Magistrate Judge recommending that the motion to be suppress be granted (App., *infra*, pp. 39a-47a) is unreported.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The judgment of the Court of Appeals was entered on July 8, 2003. A petition for re-hearing en banc was timely filed, and was denied on August 27, 2003. The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 13.3, and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In 1991, Jimmy Doug Shelton, a lawyer practicing in Tupelo, Mississippi, married Cheryl Wheeler. From the time of their marriage, until April 27, 1997, the two lived in a house owned solely by Shelton. On that date, believing that her husband was having an affair, Cheryl Wheeler moved out of the house, with no intention of ever moving back in, and with the additional intention of ending the marriage. She left behind some clothing, some photographs, and some furniture. By the middle of May, however, she had taken all her small personal effects from the house, gaining entry by using her key and her personal alarm code. Shelton was aware that Cheryl Wheeler was entering his house from time to time after April 27, 1997, but believed that her visits were only to retrieve personal effects, and mail.

Unbeknownst to Jimmy Doug Shelton, or Cheryl Wheeler, the Internal Revenue Service (IRS) had begun a criminal investigation of Shelton in March, 1997. The IRS

suspected him of under-reporting the income from a licensed bingo operation. By April, 1997, the IRS agents conducting the investigation had recruited Cheryl Wheeler's sister, Debbie Wheeler, as an informant. Debbie Wheeler was an employee of Shelton in his law practice.

Almost immediately after Cheryl Wheeler moved out, her sister Debbie told her of the criminal investigation, and arranged for Cheryl to meet the IRS agents and the Assistant United States Attorney supervising their investigation. This meeting took place on May 5, 1997. It is undisputed that from May 5, 1997 forward, Cheryl Wheeler began acting as a paid informant for the Internal Revenue Service, *i.e.,* she became an agent for the Government. It is also beyond dispute that between May 5, 1997 and August 8, 1997, Cheryl Wheeler conducted at least nine (9) searches of Shelton's house, and seizures of evidence from it, all at the behest and under the direction of the Government. While these searches and seizures were sometimes combined with trips to retrieve mail, and other personal items, the primary purpose of the visits was to further the Government's criminal investigation.

In September, 2000, a federal grand jury sitting in the Northern District of Mississippi returned a fifty (50) count indictment against Jimmy Doug Shelton and three others, charging them with a wide variety of offenses, including false statements (18 U.S.C. § 1001), wire fraud (18 U.S.C. § 1341), operating an illegal gambling business (18 U.S.C. § 1955), money laundering (18 U.S.C. §§ 1956, 1957), and tax evasion (26 U.S.C. §§ 7206(1) and 7206(2)).

Following his indictment, Shelton moved to suppress the evidence that had been obtained from his house by Cheryl Wheeler.[1] In response to the motion, the government argued that "Shelton's acquiescence to Cherl's entry into the home coupled with his failure to change the locks and the security code is evidence that he assumed the risk that Cheryl might consent to a search of the premises and that Cheryl had sufficient common authority and joint access to the residence to consent to a search."

Following a three day evidentiary hearing, the magistrate-judge concluded that Cheryl Wheeler "did not have the access and control over the premises necessary for a

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[1] The motion to suppress, and the supplement to it, alleged that the searches, and seizures of evidence, did not fall into any of the exceptions to the warrant requirement of the Fourth Amendment: "(5) At the time of the searches and seizures, Cheryl Shelton, Camiolle Prather and Debbie Wheeler had no actual or apparent authority to consent to a search of the residence of the Defendant, Jimmy D. Shelton, and the agents of the Internal Revenue Service who directed them to make the searches and seizures were aware that they lacked either actual or apparent authority to do so; (6) The searches and seizures were made without a warrant and without probable cause or authority of law; (7) The searches and seizures did not fall within any of the exceptions of the Fourth Amendment's warrant requirement; (8) There were no exigent circumstances to justify a search without a warrant; (9) The searches and subsequent seizures were unreasonable; (10) The government's conduct in targeting the Defendant, Jimmy D. Shelton, and in having his estranged wife act as a paid informant and surreptiously [*sic*] gain entrance to his house to make unlawful searches and seizures of documents and other items when the government knew that she had neither actual or apparent authority to remove the documents is a violation of due process and is so outside the norms of fundamental fairness that this Court should exercise its supervisory powers to supress the evidence." *Defendant Jimmy Doug Shelton's Motion to Suppress Evidence Seized in Illegal Search,* pp. 2-3.

valid consensual search. The government could have obtained a warrant – and they should have. A Fourth Amendment violation occurred on the entries and searches of defendant Shelton's home on May 10, 1997, and thereafter." (App. p. 45a). In the words of the magistrate-judge: "Defendant Shelton clearly did not consent to a paid government informant entering his home to retrieve other than personal items." (App. p. 45a).

The Government filed objections to the Report and Recommendation. Thereafter, the district judge issued his Memorandum Opinion, in which he declined to follow the Magistrate-Judge's recommendation, and denied Shelton's motion to suppress evidence (App. pp. 21a-38a). The district court framed the issue as follows:

> The issue presented for this Court's consideration is whether Jimmy Doug Shelton's Fourth Amendment rights were violated when the government obtained access to the evidence through the cooperating witness without a warrant. The defendant's principle contention is that Cheryl became an "agent" of the government for Fourth Amendment purposes, and, therefore, could not do what the government investigators themselves could not do. Moreover, according to the defendant, Cheryl Shelton did not have the adequate authority to consent to a search. (footnote omitted)

(App. p. 25a).

Although the district judge accepted the facts as found by the magistrate-judge, he found that as a matter of law, "Cheryl Shelton had actual authority to permit a search 'in [her] own right.'" (App. p. 28a). The district court, relying on the opinion of the Fifth Circuit in *United States v.*

Jenkins, 46 F.3d 447 (5th Cir. 1995) found nothing constitutionally objectionable in having an agent *of* the government "consent" to, and then conduct a warrantless search *for (and by)* the government:

> The Fifth Circuit visited a similar set of facts in *Jenkins v. United States*, 46 F.3d 447 (5th Cir. 1995). In *Jenkins* an employee of a distributor of allegedly obscene videotapes became a cooperating government witness in the criminal investigation of his employer. Over a five week period, the employee allowed the FBI to examine and copy a number of the videotapes that came into his possession. In holding that no Fourth Amendment violation occurred, the court recognized a simple, yet cogent principle: One who possesses the authority to engage in certain conduct before becoming an "agent" of the government may continue to engage in the same conduct without implicating the Fourth Amendment. In the Fifth Circuit's words, "becoming an 'agent' for purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which was authorized prior to entering the agency relationship." *Jenkins*, 46 F.3d at 460. Thus, because the employee maintained the same actual and apparent authority over the videotapes before and after his initial cooperation with the government, his conduct in turning over the disputed materials to the FBI did not violate the Fourth Amendment. The relevant inquiry, therefore, is whether Cheryl Shelton possessed the adequate authority such that she could have consented to a search in her own right which would have yielded the evidence at issue at the time of her agreement with the government. If so, whether or not she became an "agent" of the government is irrelevant because

> such conduct does not violate the Fourth Amendment. *Id.*

(App. p. 26a).

Following the denial of his motion to suppress evidence, Shelton, pursuant to a plea agreement, entered a plea of guilty to one count of filing a false tax return, reserving his right to appeal the denial of his motion to suppress evidence, and if successful on appeal, to withdraw his plea of guilty.

On appeal, "Shelton argue[d] . . . (as he did in the district court) that by using Cheryl as a paid informant for the purpose of conducting warrantless searches of his home, the government violated his Fourth Amendment rights." (App. p. 8a) The Fifth Circuit, however, gave no consideration whatsoever to Cheryl Wheeler's status as a government agent, but instead viewed the case exclusively in terms of consent.[2] In the words of the Fifth Circuit:

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[2] As discussed *infra*, the Fifth Circuit treats the fact that one is acting as a government agent as irrelevant, if one otherwise has the authority, as a private citizen, to do that which is being requested by the government. See *United States v. Jenkins*, 46 F.3d 447, 460 (5th Cir. 1995):

> Appellee's argument suffers from one fatal flaw. Whether Boyd is an agent of the government or not is of no moment unless his conduct violated the Fourth Amendment. In other words, becoming an "agent" for purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which was authorized prior to entering the agency relationship. Even if we assume Boyd became an agent of the government, he had the exact same actual and apparent authority after agreeing to cooperate with the government as he did prior to entering into the agreement. As discussed above, Boyd's conduct appears from the record to

(Continued on following page)

"[T]he precise issue presented ... is whether Cheryl maintained the same (or sufficient) *common authority* to consent to this [her] search[es], beginning a mere week after she had vacated the house and continuing for the next four months, during which time she took evidence from Shelton's house and gave it to the government." (App. pp. 7a-8a). Finding that she did possess such "common authority," the Court of Appeals upheld the ruling of the district court.

To reach its conclusion, the Court of Appeals purported to rely primarily on this Court's decisions in *United States v. Matlock*, 415 U.S. 164 (1974), *United States v. Jacobsen*, 466 U.S. 109 (1984), and *Hoffa v. United States*, 385 U.S. 293 (1966).

From its reading of *Matlock*, the Court of Appeals concluded that Cheryl Wheeler, as a third party, possessed the "common authority over or other sufficient relationship to the premises" to "consent" to the government's searches. From its reading of *Jacobsen*, and *Hoffa*, the Court of Appeals determined that under the facts of this case, such a finding was entirely consistent with a "privacy interests" analysis, and with the diminished expectation of privacy that necessarily followed from Shelton's granting Cheryl Wheeler access to his house. In the words of the Fifth Circuit:

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have been within his *actual authority*, and not violative of the Appellee's reasonable expectations of privacy. Since no Fourth Amendment violation occurred, whether Boyd became a government agent is not relevant. (footnote omitted)

> By continuing to allow Cheryl free access to the house, and by continuing to involve her in the skimming operation, Shelton demonstrated that he held no subjective expectation of privacy toward her at any time, either before or after her move.
>
> Neither was Shelton's expectation that Cheryl would keep the bingo operation materials private reasonable. "It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities . . . " [citing *United States v. Jacobsen*, 466 U.S. 109, 117 (1984)]. Although Shelton might have expected that, for her own best interests, Cheryl would not divulge information or evidence about their illegal activities, the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." [citing *Hoffa v. United States*, 385 U.S. 293, 302 (1966), and *Jacobsen*, 466 U.S. at 117)].

(App. p. 17a).

For the reasons discussed below, this opinion by the Court of Appeals creates a Fourth Amendment doctrine in the Fifth Circuit that is contrary to this Court's precedent. Moreover, the opinion is in conflict with the other circuit courts of appeal, and it undermines this Court's opinion in *Katz v. United States*, 389 U.S. 347 (1967), by severely limiting the scope of those expectations of privacy that will be deemed "reasonable."

REASONS FOR GRANTING THE PETITION

Introduction

It is not hyperbole to describe this case as being at the intersection of four extremely significant lines of well-established Fourth Amendment law. These are: (1) the line created by *Burdeau v. McDowell*, 256 U.S. 465 (1921), the case that clarified the rule that the Fourth Amendment is a limitation on *Government* action only; (2) the line represented by *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), in which the Court articulated the standards for determining when a person's consent to a search is voluntary; (3) the line of cases describing the "third-party" consent doctrine, (most recently discussed by the Court in *Illinois v. Rodriguez*, 497 U.S. 177 (1990)); and (4) the broad line of authority created by *Katz v. United States*, 389 U.S. 347 (1967), the holding that gave rise to the concept that "the Fourth Amendment protects people, not places," together with *Katz*'s attendant limitation that the Amendment protects only those subjective expectations of privacy that society is prepared to recognize as reasonable.

Remarkably, in *Shelton* the Court of Appeals reached a result that is at odds with this Court's holdings in all four areas – primarily because the Court of Appeals began with the flawed premise that the Fourth Amendment does not apply to government action if that action is undertaken in a "dual capacity," *i.e.*, if the government agent conducting the search has, or has been given the right, as a private citizen, to be where he or she is. Thus, because the Court of Appeals ignored the *Burdeau* rule – although it was undisputed that Cheryl Wheeler was acting as a government agent – it was then constrained to conduct an analysis of "consent" that never addressed the very basic question of whether a government agent can validly

"consent" to a search of the property of a third party that the agent herself is conducting for the government that employs her.

Moreover, the Fifth Circuit relied almost exclusively on the doctrine of "assumption of the risk" to defeat petitioner's Fourth Amendment rights. In doing so, however, the Court of Appeals used the concept in a way never envisioned by, and completely at odds with this Court's holdings in both *United States v. Matlock*, 415 U.S. 164 (1974), and *Katz v. United States*, 389 U.S. 347 (1967). In short, this case raises several important, unresolved Fourth Amendment issues, making review by this Court appropriate.

I. THE OPINION OF THE FIFTH CIRCUIT IS CONTRARY TO THE PRECEDENT OF THIS COURT IN AT LEAST THREE REGARDS

A. When the Government is conducting searches, and seizures, the Fourth Amendment is always relevant

This Court's decision in *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) is normally cited for the proposition that the "[Fourth Amendment] was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . . " It is equally true, however, that *Burdeau* reaffirms the principle that when there *is* governmental action, the Fourth Amendment cannot be disregarded:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection

> applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority, it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

Burdeau, supra, p. 475.

Since *Burdeau,* this Court has with some regularity addressed the question of when one is acting as a government agent for purposes of the Fourth Amendment. *See Lustig v. United States*, 338 U.S. 74 (1949); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Walter v. United States*, 447 U.S. 649 (1980); *United States v. Jacobsen*, 466 U.S. 107 (1984); and *Arizona v. Evans*, 514 U.S. 1 (1995). All of these cases have at least one thing in common: each reaffirms the principle that when government acts are involved, the actors are bound by the Fourth Amendment. At no time has this Court ever even hinted that the Fourth Amendment becomes inapplicable when one is conducting a search (or a seizure) wearing two hats, *i.e.,* as a private citizen with a right to be there, and as a government agent, with no independent right to be there.

To the contrary, in *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971), the Court made it clear that when one is acting as a government agent – even if one has the right to be there as a private citizen – the test is whether the *Government* has the right to be there:

> The first branch of the petitioner's argument is that when Mrs. Coolidge brought out the guns

and clothing and then handed them over to the police, she was acting as an "instrument" of the officials, complying with a "demand" made by them. Consequently, it is argued, Coolidge was the victim of a search and seizure within the constitutional meaning of those terms. Since we cannot accept this interpretation of the facts, we need not consider the petitioner's further argument that Mrs. Coolidge could not or did not "waive" her husband's constitutional protection against unreasonable searches and seizures.

Had Mrs. Coolidge, **wholly on her own initiative**, sought out her husband's guns and clothing and then taken them to the police station to be used as evidence against him, there can be no doubt under existing law that the articles would later have been admissible in evidence. *Cf. Burdeau v. McDowell*, 256 U.S. 465. The question presented here is whether the conduct of the police officers at the Coolidge house was such as to make her actions their actions for purposes of the Fourth and Fourteenth Amendments and their attendant exclusionary rules. **The test, as the petitioner's argument suggests, is whether Mrs. Coolidge, in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state when she produced her husband's belongings.** (emphasis added, citations omitted).

One need only substitute the name Cheryl Wheeler for that of Mrs. Coolidge to place the error of the Court of Appeals in focus: the *government's* right to search is not measured by what a private party has done, or might do.

The mistake made by the Court of Appeals is the one Justices White and Brennan warned against, in their concurring opinion in *Walter v. United States*, 447 U.S. 649, 660 (1980):

> I agree with Mr. Justice STEVENS that the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party. (footnote omitted). I write separately, however, because I disagree with Mr. Justice STEVENS' suggestion that it is an open question whether the Government's projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government, *ante*, at 657, n.9. **The notion that private searches insulate from Fourth Amendment scrutiny subsequent government searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles.**

Walter v. United States, supra (emphasis added).

The clear language of this Court's cases notwithstanding, the district court, expressly relying on the decision of the Fifth Circuit in *United States v. Jenkins*, 46 F.3d 447 (5th Cir. 1995), and the Court of Appeals, implicitly doing so, did not consider Cheryl Wheeler's acts to be those of the Government, because, in the Fifth Circuit's words, "becoming an 'agent' for purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which was authorized prior to entering the agency relationship." *Jenkins*, 46 F.3d at 460. In other words, if

you can do it as a private citizen, you can do it as a government agent.

As indicated by the statement from Justices White and Brennan, above, such an approach to the Fourth Amendment is just wrong. Although a private citizen still has the "right to engage in conduct which was authorized prior to entering the agency relationship," that right is held by the citizen, not by the government. It is neither transferable to the government, nor does it "insulate" the government from Fourth Amendment scrutiny. The Fifth Circuit's approach to this basic aspect of Fourth Amendment law should be reviewed by this Court.

B. The Government cannot give itself permission or consent to conduct searches and seizures

As is made plain by the opinions of this Court, any assessment of the validity of a third party's consent to search property owned or occupied or under the control of another must look to two things: whether the third party's consent was lawfully obtained by law enforcement; and whether the third party had the authority to consent. *United States v. Matlock*, 415 U.S. 164, 170-171 (1974). The first inquiry is conducted by looking to the factors described in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); the second, by looking to the factors set out in *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

In this case, the Court of Appeals never considered the question of whether Cheryl Wheeler's "consent" to the searches and seizures was *voluntary*. In fact, it could not do so, because conducting the type of analysis called for by *Schneckloth v. Bustamonte, supra*, borders on the absurd

when the person from whom consent is being obtained is an agent of the entity seeking consent. In such instances, consent is a foregone conclusion. Implicit in most agency relationships – and certainly in all "agency relationships" in which the person giving consent is also seeking immunity from prosecution – is precisely the type of coercion this Court warned against in *Schneckloth v. Bustamonte*:

> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more that a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

Schneckloth v. Bustamonte, *supra*, p. 228.

There is no holding of this Court that could be invoked to support a holding that an agent of the government can consent to the search of a third-party's property, regardless of that agent's relationship to or with the third party. In fact, as discussed in Part 2, *infra*, there is no court in the United States that has so held – except the Fifth Circuit. In short, the opinion of the Fifth Circuit in this case disregards every one of this Court's opinions on the question of "voluntariness," and therefore should be reviewed.

C. One does not "assume the risk" that a third party will consent to Government searches that exceed the scope of the third-party's "common authority"

Beginning with *Chapman v. United States*, 365 U.S. 610 (1961), this Court has directly considered the question

of the circumstances under which a third party could possess the right to consent to a search of another person's premises or effects on at least five (5) occasions. Through these decisions, the Court has developed an analysis that looks to both the consenting third party's "common authority over or other sufficient relationship to the premises," and to the expectations of privacy of the owner or co-owner of the premises or effects. As discussed below, what the Court has made clear time and again is that "mere property interests" cannot be used to defeat Fourth Amendment rights, which can also be described as "reasonable" expectations of privacy. In this case, however, the Fifth Circuit has used "mere right of access," and coupled it with an "assumption of the risk" doctrine taken from a completely different context, to create an exception to the Fourth Amendment that swallows it whole.

In *Chapman*, the third party was the defendant's landlord. This Court found the search of the tenant's premises illegal, reasoning that " . . . to uphold such an entry, search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords].'" *Chapman, supra*, pp. 616-617, quoting *Johnson v. United States*, 333 U.S. 10, at 14 (1948). The Court further noted that it would not "*import* into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law . . . [because] we ought not to bow to them in the fair administration of criminal law." *Chapman, supra,* quoting *Jones v. United States*, 362 U.S. 257, 266-267 (1960) (emphasis added). In short, the *Chapman* court explicitly

held that it would not use property law concepts to *trump, or defeat* a citizen's rights under the Fourth Amendment.

The Court did not re-visit the subject of third party consent to a search for almost twenty years. When it did, in *Stoner v. California*, 376 U.S. 483, 488-489 (1964), it again relied upon *Jones* to reject the idea that a hotel clerk could consent to the search of a guest's room:

> * * * Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority."
>
> * * *
>
> It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, **which only the petitioner could waive by word or deed, either directly or through an agent.** (emphasis added)

Five years later, in *Frazier v. Cupp*, 394 U.S. 731 (1969), the Court, for the first time, upheld a search based upon consent given by a third party. In *Frazier*, the Court, without elaborate analysis, found that the joint user of a duffel bag had the authority to consent to a search of it. In the words of the Court:

> * * * Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside.

Frazier v. Cupp, 394 U.S. at 741.

Thus was the "assumption of the risk" doctrine grafted onto the law of search and seizure. But it was done so in a context that makes perfect sense: if two parties have equal, independent rights to property, each assumes the risk that the other will allow the property to be searched. In actuality, the issue is not actually "third-party consent" so much as it is "third-party incrimination."

Frazier was followed by *United States v. Matlock*, 415 U.S. 164 (1974). Although the *Matlock* court expressly endorsed the concept of third-party consent, it added little of substance to the analysis to be conducted to determine whether the party giving consent has the actual authority to do so. Instead, the Court simply brought together the language it had used in *Chapman*, *Stoner*, and *Frazier*, to create the multi-part factual analysis that most appellate courts now use.

Third-party consent was last addressed by the Court in *Illinois v. Rodriguez*, 497 U.S. 177 (1990). With regard to the test to be employed, *Rodriguez* changed nothing. Instead, the decision simply answered (in the affirmative) the "apparent authority" question left open in *Matlock*.

Thus, the Court's cases implicitly hold that it is one thing for a third party to consent to a search of commonly occupied property, because that third party has an absolute, *independent* right to be there. But, as the Court's other cases imply, and as this case illustrates, it is quite another for a third party to consent to a search of property based on an authority that is purely *derivative*, *i.e.*, an authority that is based on nothing more than the third-party's having been given permission to be on, or to have access to the property.

In the former case, the common occupant has truly "assumed the risk" that the co-occupant/co-owner may grant the Government permission to search, based upon the co-occupant/co-owner's right to do so. But with regard to the latter, *i.e.,* derivative authority, that *assumption* does not hold. Certainly, the person granting the authority for the third party to be present *runs* the risk that person will allow others, including the government, to come on to the property to conduct searches. But running the risk, and *assuming* the risk are two very different things. And when it is the Government that is conducting the search, the line between the two is drawn by the Fourth Amendment.[3]

As discussed *infra*, what is at issue are the unspoken limits of a third party's authority, and why those limits are necessarily co-extensive with reasonable expectations of privacy. In cases in which one's "common authority" is purely derivative, *i.e.,* one is a guest, or visitor, the reasonable expectation is that the guest or visitor will not waive the host's rights under the Fourth Amendment, because the guest or visitor cannot, without express permission.

In the Fifth Circuit, however, as exemplified by *Jenkins*, and now *Shelton*, the Fifth Circuit believes that once a person is given access to a home, almost *all* expectations of privacy disappear. Such a holding is flatly

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[3] A simple example illustrates the point. If a house key is given to a neighbor, to water plants, and pick up the mail while one is on vacation, one *runs* the risk the neighbor will steal everything in the house. One does not, however, *assume* that risk.

contrary to the opinions of this Court. This Court's review is therefore warranted, and certiorari should be granted.

II. THE FIFTH CIRCUIT'S OPINION IN *SHELTON* IS IN CONFLICT WITH THE OPINIONS OF OTHER COURTS OF APPEALS

The Fifth Circuit first considered the issue of the applicability of the Fourth Amendment to searches conducted by persons who were acting as government agents, but who privately had the right to act as they did, in *United States v. Jenkins*, 46 F.3d 447 (1995). In *Jenkins,* the Government had recruited one of the defendant's employees, Mark Boyd, to conduct warrantless searches of boxes containing obscene videotapes, and to thereafter turn the videotapes over to the Goverment for inspection and copying. *Jenkins, supra*, pp. 447-451. Although the Fifth Circuit found that Boyd was *not* an agent of the federal government, it then went on to hold that even if he was, it was " . . . of no moment unless his conduct violated the Fourth Amendment," *Jenkins*, *supra*, p. 460. The Fifth Circuit then reasoned, in perfectly circular fashion, that the employee's conduct did not violate the Fourth Amendment, because he had the right, as an employee, to act as he did:

> Appellee's argument [that as a government agent, Boyd "had no more authority to search or seize evidence than any of the FBI agents"] suffers from one fatal flaw. Whether Boyd is an agent of the government or not is of no moment unless his conduct violated the Fourth Amendment. In other words, becoming an "agent" for purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which

> was authorized prior to entering the agency relationship. Even if we assume Boyd became an agent of the government, he had the exact same actual and apparent authority after agreeing to cooperate with the government as he did prior to entering into the agreement. As discussed above, Boyd's conduct appears from the record to have been within his *actual authority*, and not violative of the Appellees' reasonable expectations of privacy. Since no Fourth Amendment violation occurred, whether Boyd became a government agent is not relevant. (footnote omitted).

United States v. Jenkins, supra, p. 460.

From *Jenkins*, it was just a short step for the Fifth Circuit to reach its core holding in *Shelton*: if an individual has a right, as a private citizen, to be where he or she is, it matters not that they are acting for the Government – the protections of the Fourth Amendment do not apply. No other circuit has embraced a notion of such a "dual capacity."

As might be expected, all of the other Circuit Courts of Appeals have addressed instances in which persons with access to premises or property were allegedly acting as government agents. Research indicates that *without exception*, every other Circuit Court of Appeals has made the *Burdeau* inquiry first: *i.e.,* was this person acting as a private citizen, or as a government agent? And without exception, the other Courts of Appeals have found that when one was acting as a government agent, the Fourth Amendment applied, period. In short, in every Circuit but the Fifth, the measure under the Fourth Amendment is not what the private citizen has the right to do, but what the government is prohibited from doing.

Review by this Court is appropriate to resolve this conflict between the Fifth Circuit, and all other circuits.

III. THE "ASSUMPTION OF THE RISK" APPROACH TO THE FOURTH AMENDMENT TAKEN BY THE FIFTH CIRCUIT IS INCONSISTENT WITH ALL REASONABLE EXPECTATIONS OF PRIVACY THAT OUR SOCIETY IS PREPARED TO RECOGNIZE

As noted above, the Court of Appeals focused exclusively on whether Cheryl Wheeler had the "common authority" to consent to the searches she was conducting for the government, thereby avoiding the harder inquiry of whether the "consent" Cheryl Wheeler gave was valid. But what is also missing from the Fifth Circuit's opinion is an examination of the distinction that must be drawn between one's expectations of privacy with regard to third parties who are private citizens, and one's expectations of privacy with regard to the government, and its agents. The former are defined by societal practices, the latter, by the Fourth Amendment.

It is certainly true that because Shelton gave Cheryl Wheeler access to his home, he "assumed the risk" that she might see something that was incriminating. Shelton's expectations of privacy were diminished precisely to the degree that Cheryl Wheeler's access was not restricted. Moreover, Shelton ran the risk that Cheryl Wheeler would report to the Government any wrongdoing she saw, or participated in. But neither of these situations involves *Government* conduct.

Nor is there *Government* conduct when a "wrongdoer" has the "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302 (1966). This is a quintessentially "private act," and the Government cannot be expected to turn a deaf ear, or a blind eye, to information about criminal activity that is being revealed to it voluntarily.

And certainly, the Government has the right to go where it is invited, and one assumes the risk that an invitee may be a Government agent. But the Government cannot issue its own invitation. And when Cheryl Wheeler became an agent, all concepts of assumption of the risk became inapplicable. Citizens do not "assume the risk" that their Government will conduct warrantless searches and seizures in their homes. To the contrary, that is precisely why the Fourth Amendment exists.

As this Court has said, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court, Eastern District of Michigan*, 407 U.S. 297, 313 (1972). But that is the one evil against which the Fifth Circuit refused to protect Shelton.

Under the holdings of *Jenkins,* and *Shelton*, *anyone* who trusts a third party – be that third party an estranged spouse, an employee, a housekeeper, a nanny, or a law clerk, and allows that person access into one's house, or office – "assumes the risk" that this person will be recruited by the Government and thereafter used as an agent to conduct warrantless searches and seizures of one's property. According to *Jenkins* and *Shelton*, because the risk has been "assumed," what would otherwise be

unmistakable violations of the Fourth Amendment are transformed into something legal. In short, the Fifth Circuit has created a body of law that allows the Government to give itself permission to conduct searches, and seizures, without a warrant, without probable cause – and without the inconvenience of prior judicial review.

Contrary to the unsupported, and insupportable conclusions of the *Jenkins* court, and the *Shelton* court, one does have expectations of privacy with regard to the conduct of one's employees, and third parties, and one does have expectations that one's personal property will not be delivered to the Government by one's employee. And these are indisputably expectations that society is prepared to recognize as reasonable. If Cheryl Shelton had not been acting as a government agent, her taking Shelton's property from Shelton's house would have been theft, pure and simple. What "protects" her from such charges is her status as a Government agent. But that same status as a Government agent is what requires a warrant in the first place.

In 1886, this Court handed down its opinion in *Boyd v. United States*, 116 U.S. 616 (1886). In rejecting the Government's arguments that the defendant in that case could be compelled to produce private papers (because to do so would violate the defendant's Fourth and Fifth Amendment rights), Justice Bradley wrote:

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive

> form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of personal and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd, 116 U.S. at 635.

This case demonstrates the validity of Justice Bradley's warning. Review by this Court is warranted.

CONCLUSION

Wherefore, this Court is urged to grant this petition for a writ of certiorari.

New Orleans, Louisiana, this 24th day of November, 2003.

Respectfully submitted,

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337 F.3d 529

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus JIMMY DOUG SHELTON, Defendant-Appellant.

No. 02-60326

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

July 8, 2003, Filed

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff-Appellee: Alfred E Moreton, III, Assistant US Attorney, Charles Wiley Spillers, Assistant US Attorney, US Attorney's Office, Northern District of Mississippi, Oxford, MS.

For JIMMY DOUG SHELTON, Defendant-Appellant: John Wesley Hall, Little Rock, AR. Michael S Fawer, Covington, LA.

JUDGES: Before JONES, WIENER, and DeMOSS, Circuit Judges.

OPINION BY: WIENER

OPINION: WIENER, Circuit Judge:

Defendant-Appellant Jimmy Doug Shelton ("Shelton") appeals the district court's denial of his motion to suppress evidence that his estranged wife, Cheryl Shelton ("Cheryl"), removed from his house and gave to law enforcement officials. On the basis of our close review of the record and our analysis of relevant authority, we hold that Shelton's Fourth Amendment rights were not violated by admission of evidence obtained for the government by Cheryl as a paid informant. Therefore, we affirm.

I. FACTS AND PROCEEDINGS

After six years of marriage, Cheryl abruptly left the home that she shared with Shelton. She moved out because of an extra-marital affair that Shelton was allegedly having with his secretary. When she left, Cheryl took some of her clothes and other possessions with her, but she left behind many other personal belongings, including, among other things, clothes, jewelry, photographs, and furniture. With Shelton's knowledge and assent, she also kept her house key and her personal security access code for the house alarm system. Although Cheryl never moved back into the house, she and Shelton were not legally separated during the period in question and neither party filed for divorce.

A few days after she moved out, Cheryl together with her daughter, Camile Prather ("Camile") returned to the former marital residence so that Cheryl could retrieve some more of her belongings. Camile videotaped boxes of bingo cards while she was in the house. At about the same time, Cheryl's sister, Debbie Wheeler ("Debbie") who had been cooperating with a government investigation of Shelton since the previous month, informed Cheryl of the on-going investigation of Shelton's bingo operations and encouraged her to speak with the government. Cheryl agreed and met with an IRS agent and an Assistant U.S. Attorney a week after she had vacated her marital home.

At that meeting, Cheryl volunteered to help the government with its criminal investigation of Shelton, testifying later that she "wanted to do the right thing" and

that she "didn't want to get in trouble."[1] The agents orally assured Cheryl that if she would assist in the investigation, she would not be prosecuted for her role in the alleged conspiracy and indicated that she would be compensated financially in some way.

Cheryl informed the government agents that there were items in Shelton's home that might further their investigation, including bingo cards in an upstairs bedroom and a notebook with records of the alleged skimming operation on top of a grandfather clock in the front hallway of the house. The government agents advised Cheryl of their interest in the notebook and any other items that she could obtain relative to the skimming operation, and Cheryl subsequently gave the government the videotape that Camile had made during their first visit to Shelton's residence together. After that initial visit, Cheryl returned to Shelton's house many more times, both on her own accord and at the specific direction of the government. She did so to obtain particular items of evidence for the benefit of the government's investigation, as well as to pick up her mail and personal belongings. She continued making visits to the house over a period of at least four months.

After Shelton was charged, he filed a motion to suppress, challenging nine specific visits to his house by Cheryl and the items she had taken.[2] In recommending

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[1] Cheryl had been actively involved in the illegal skimming operation as a co-conspirator and, as explained *infra,* continued to alter the bingo session sheets, although at that point as a government agent, as late as October 1997.

[2] The items retrieved are as follows: (1) 2 pages from the notebook; (2) 12 photos of skim records and 3 photos of boxes of bingo cards; (3) 24

(Continued on following page)

that the district court grant the motion to suppress, the magistrate judge acknowledged that Shelton had made no attempt to limit Cheryl's access to the home, and noted that the items that Cheryl had taken from the home after she moved out were located in areas to which she had free access. Emphasizing that Cheryl maintained no ownership interest in the home, however, the magistrate judge concluded that Cheryl's permission from Shelton to enter the home, although not limited spacially, was limited functionally to picking up her mail and personal belongings. This, concluded the magistrate judge, limited the purpose of her authorized access. Although she was entitled to retrieve personal items, ruled the magistrate judge, Cheryl's principal purpose in entering the home was not to pick up her mail and personal items, but to collect evidence against her husband at the direction of the government. Consequently, reasoned the magistrate judge, her activities exceeded the limited purpose for which she was allowed into the home by Shelton, and thus constituted unlawful searches.

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photos of boxes of bingo cards, a promissory note of Shelton to pay his brother, Billy Shelton, $100,000 in $2,500 monthly payments, a handwritten schedule of $97,500 of $2,500 monthly payments, and receipt dated 12/03/96 showing a payment to Billy Shelton, and a typed payment schedule dated 11/06/95 to 10/18/96; (4) bingo paper packing slip; (5) the notebook, which was copied by agents and then returned to the top of the grandfather clock by Cheryl; (6) at the request of Sue Carnathan, who worked with Shelton, Cheryl accompanied her to the home to pick up some bingo cards; (7) note signed by Shelton's son, John, regarding the "exact amount" on paperwork and bingo session sheets; (8) skim records and an envelope of skim records delivered to agents for photocopying; and (9) invoice/packing slip for bingo cards sold to "Bob Harrison."

Despite the recommendation of the magistrate judge, the district court denied Shelton's motion to suppress.[3] The court found that Shelton had neither attempted to limit Cheryl's access to the home nor attempted to exclude Cheryl in any way from access to the evidence that she obtained and turned over to the government.[4] The court held that Cheryl had actual common authority to permit a search by agents of the government and to deal directly with the contents of the house.[5]

After the court denied his motion to suppress, Shelton agreed to plead guilty to one count of the superseding indictment, viz., filing a false tax return for his bingo operation. As part of the agreement, Shelton consented to the forfeiture of the bingo building and $303,718.73, subject to pending forfeiture actions, but reserved the right to appeal the denial of his motion to suppress evidence and, if successful, to withdraw his guilty plea. Shelton was sentenced to nine months imprisonment, one year of supervised release, and a fine of $20,000. He timely filed a notice of appeal.

II. ANALYSIS

A. **Standard of Review**

When hearing an appeal from a district court's ruling on a motion to suppress, we review that court's factual findings for clear error and its ultimate conclusion about

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[3] *United States v. Shelton,* 181 F.Supp.2d 649 (N.D. Miss. 2001).

[4] *Id.* at 655.

[5] *Id.* at 656-58.

the constitutionality of the law enforcement conduct *de novo*.[6] We consider the evidence in the light most favorable to the prevailing party, here the government.[7]

B. Authority to Grant Consent

Valid consent to a search is a well-established exception to the normal requirement that law enforcement officers must have a warrant grounded in probable cause before conducting a search.[8] In *United States v. Matlock,* the Supreme Court extended to third parties the ability to grant this consent when those third parties "possess[ ] common authority over or other sufficient relationship to the premises or effects sought to be inspected."[9] "Common authority," the Court explained is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[10]

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[6] *United States v. Orozco,* 191 F.3d 578, 581 (5th Cir. 1999).

[7] *Id.*

[8] *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973).

[9] 415 U.S. 164, 171, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974) (emphasis added).

[10] *Id.* at 171, n.7.

Based on this definition and even a cursory glance at the facts, we have no doubt that if government agents had searched Shelton's home with Cheryl's consent while she was still living there, their search would have been lawful: She unquestionably would have had the authority "common authority" with Shelton to permit a search encompassing such common areas as the front hallway, where the skimming notebook lay on top of the grandfather clock, and an upstairs bedroom, where the illegal bingo cards were stashed. The same would have held true for anything that she might have removed from the house and turned over to the government. This is so because, even though Cheryl never had an ownership interest in the house, she was Shelton's wife and had shared its occupancy with him for at least six years.[11] Shelton left the bingo operation's materials in common areas of the house, demonstrated no intention to conceal those items from Cheryl, and, in fact, continually solicited her active participation in the skimming operation. All of these factors would have given Cheryl "joint access or control for most purposes," as long as she resided in the house with Shelton as husband and wife.

The only difference between this hypothetical example and the actual facts of the instant case is that Cheryl had moved out of the marital residence one week before she agreed to assist the government in its investigation. Thus,

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[11] In *Matlock*, the Court expressly downplayed the significance of property ownership when deciding whether a third party possessed common authority to consent. 415 U.S. at 171, n.7 (stating that "the authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements").

the precise issue presented here is whether Cheryl maintained the same (or sufficient) common authority to consent to this search, beginning a mere week after she had vacated the house and continuing for the next four months, during which time she took evidence from Shelton's house and gave it to the government. Although she did not literally usher government agents into the house so that they could conduct their own search, Cheryl effectively allowed them to search the premises by acting as their agent in collecting and delivering items of evidence for them during that period and at their express direction and control.

Shelton argues on appeal (as he did in the district court) that by using Cheryl as a paid informant for the purpose of conducting warrantless searches of his home, the government violated his Fourth Amendment rights. He insists that Cheryl lacked common authority under *Matlock* and *Rodriguez*. Even though with his knowledge and acquiescence, Cheryl continued to possess a key and security access code, contends Shelton, her authority to enter his home was narrowly restricted to picking up her mail and retrieving personal belongings; and, as a result, he retained a reasonable expectation of privacy in his home for all other purposes and to all other extents. This privacy interest was violated, Shelton asserts, because Cheryl's principal reason for entering his home was to gather evidence for the government, not to pick up her mail and her personal effects. Shelton relies heavily on the magistrate judge's determination that he "clearly did not consent to a paid government informant entering his home to retrieve other than personal items."

For its part, the government maintains that Shelton lost any expectation of privacy vis-a-vis Cheryl when he

made her a co-conspirator in his bingo skimming and tax fraud schemes, and used their matrimonial domicile to store illegal bingo cards and conceal records of fraudulent activities. Inasmuch as Cheryl enjoyed unlimited physical access to the entire interior of the home, without any interference from Shelton or even any requirement that he be present, left her personal possessions in the home, and retained her key and access code, argues the government, Cheryl was vested with actual and apparent authority to obtain the evidence from the house and deliver it to the government.

Even though we are aware of no case in which a court has confronted essentially identical factual circumstances, the Supreme Court and other federal circuit courts have addressed similar cases, giving us at least a degree of guidance. In the process of establishing the rule of apparent common authority, the Supreme Court in *Illinois v. Rodriguez* determined that the third party in question, the girlfriend of the defendant Rodriguez, lacked actual common authority over defendant's apartment.[12] The Court based its conclusion on several discrete factors: (1) The girlfriend had lived at the apartment with her two children for approximately six months; (2) she and her children had moved out of defendant's apartment a month before the search took place; (3) she had not contributed to rent and was not on the lease; (4) she occasionally spent the night at the apartment with Rodriguez but never went there alone and never invited friends over; (5) she took her and her children's clothing with her when she moved out,

[12] 497 U.S. 177, 181-82, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (1990).

but left some furniture and household effects; and (6) she had a key to the apartment, but might have taken it without defendant's knowledge.[13]

The facts of this case are readily distinguishable. In contrast to the girlfriend in *Rodriguez*, Cheryl had been married to Shelton for six years; neither of them took any legal steps to separate or divorce; she shared his house with him as the marital residence for at least the same amount of time as they were married; she moved out only one week before agreeing to collect evidence for the government; and after moving out, she visited the house in Shelton's absence at her will, either alone or with members of her family. These facts establish a much more substantial connection to the premises than that of the defendant's girlfriend in *Rodriguez*.

In *United States v. Smith*, we rejected a challenge to the third-party consent given by the estranged wife of the defendant.[14] Although she was estranged, the wife was present, in the defendant's absence, when the police first visited the home.[15] We noted additionally that she was colessee of the house, and that during the divorce proceedings, she was granted exclusive possession of the home.[16] Similarly, in *United States v. Koehler*, a car-search case, we concluded, on the basis of particular factual circumstances, that the wife had common authority to permit the police to search a car driven almost exclusively by her

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[13] *Id.* at 181.

[14] 930 F.2d 1081 (5th Cir. 1991).

[15] *Id.* at 1083.

[16] *Id.* at 1085.

husband.[17] Although prior to his arrest, the husband had strictly limited his wife's access to the car, we concluded that this fact was outweighed by evidence that (1) the wife was the legal owner of the car, (2) the husband allowed his son to drive it, and (3) the husband did not object when his wife was given the keys to the car by a police officer.[18] In short, our cases addressing third party consent by a defendant's spouse are also factually distinct from this case and demonstrate a closer connection of the third party to the area searched than exists here.

Several other courts have addressed and upheld instances in which a wife, sometimes estranged, has consented to a search of the residence in which her defendant-husband lived; but none of the circumstances in those cases closely mirror the ones now before us.[19] Only the

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[17] 790 F.2d 1256, 1259-60 (5th Cir. 1986).

[18] *Id.* Here, the magistrate judge, the district court, and both parties on appeal also discuss the relevance of our decision in *United States v. Jenkins*. 46 F.3d 447 (5th Cir. 1995). While *Jenkins* is similar to the extent that a third party became a government agent and consented to the search of defendant's videotapes, it is quite distinct factually. It involved an employer-employee relationship, in which the items searched were shipped to the employee and were in his sole possession when he permitted the government search. *Id.* at 449-50, 456. These differences, we conclude, are significant enough that *Jenkins* is at most of limited usefulness in our analysis.

[19] *See United States v. Gevedon,* 214 F.3d 807, 809, 811 (7th Cir. 2000) (finding that the estranged wife had common authority to consent to a search of a garage next to the house, when the wife had moved out of the house several months earlier, but a court had subsequently given her sole possession of the house and garage); *United States v. Duran,* 957 F.2d 499, 503-04 (7th Cir. 1992) (upholding the common authority of a wife to consent to a search of a farmhouse adjacent to her marital residence, even though she had no ownership interest in the property, never used the farmhouse, and had no possessions there); *United States*

(Continued on following page)

Second Circuit has upheld such a search under fairly analogous facts. In *United States v. Trzaska*, that court sanctioned a third-party consent search, because (1) the wife had moved out of the apartment she shared with her husband only two weeks before the search, (2) she still possessed a key to the apartment, and (3) she removed some personal belongings from the apartment on the day of the search.[20] *Trzaska*, however, neither indicated the wife's legal relationship to the property nor involved multiple trips to the house as a government agent for the principal purpose of obtaining evidence against the defendant husband.

Considering all of these cases together, the only rule that emerges is that the validity of a search grounded in third-party consent requires an intensely fact-specific inquiry, and that slight variations in the facts may cause the results to vary. Consequently, the question that here remains unanswered is whether Cheryl's nexus with Shelton's house, on its own terms and conditions,

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v. Brannan, 898 F.2d 107, 108 (9th Cir. 1990) (concluding that an estranged wife had common authority to consent to a search of the house of which she was joint-owner, even though she had moved out two or three months beforehand and defendant had changed the locks); *United States v. Crouthers*, 669 F.2d 635, 642-43 (10th Cir. 1982) (upholding the common authority of a partially estranged wife to consent to a search of the house, when she had moved out two weeks before the search, she still had a key, and she had been present at the house with her husband); *United States v. Long*, 524 F.2d 660, 660-61 (9th Cir. 1975) (holding that an estranged wife had common authority to consent to the search of the jointly owned house, when she removed possessions on the days of the search and, and despite the fact that she had moved out weeks beforehand and defendant had changed the locks).

[20] 859 F.2d 1118, 1119-20 (2d Cir. 1988).

amounted to a "sufficient relationship to the premises" or "joint access or control for most purposes."[21] The Supreme Court has only briefly elaborated that this standard requires us to determine whether it is "reasonable to recognize that [Cheryl] has the right to permit the inspection in [her] own right," and whether Shelton "assumed the risk that [Cheryl] might permit the common area to be searched."[22] Post-*Matlock* cases, such as *Rodriguez, Smith, Koehler* and *Trzaska*, demonstrate though that this formulation has led to very fact-oriented precedents, none of which truly govern this case. Given that the *Rodriguez* Court found actual common authority lacking under its facts, but that *Smith, Koehler* and *Trzaska* upheld common authority under their respective circumstances, the body of case law fails to furnish a clear governing principle for deciding this case.[23]

To better understand the scope of the *Matlock* standard and, more importantly, how it applies to this case, we find it useful to examine the privacy interests that animate the rule of third party consent. Although consent to a search is a well-established exception to the requirement for a warrant issued on the basis of probable cause, courts have left the theory underlying this rule largely unarticulated. The validity of a consensual search is presumably

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[21] *United States v. Matlock*, 415 U.S. at 171 & n.7.

[22] *Id.* at 171, n.7.

[23] We recognize that *Rodriguez*, which rejected common authority, concerned a defendant's girlfriend, and these other cases, which found such authority, concerned defendants' spouses; but, without more, we cannot conclude this distinction alone determines whether a third-party consent is permissible.

based on the premise that a warrant and probable cause are unnecessary to justify the invasion of privacy that accompanies a consensual search, because by consenting, the individual evinces a voluntary willingness to forgo that privacy. Similarly, third party consent presumably extends the capacity to give consent to individuals to whom the one with the privacy interest has already substantially ceded his expectation of privacy. For example, when A allows B to intrude on A's expectation of privacy, A is essentially granting B a particular level of access and control over A's area of privacy, and is thereby assuming the risk of B's exposing A's interest to others. Thus, it is the interest of the defendant (A in our example) and the extent to which he either retains or forgoes his expectation of privacy that substantially informs our understanding of common authority in third-party consent situations.[24]

Viewing third-party consent through the prism of privacy interests enables us to approach the question of common authority by asking whether A sufficiently relinquished his expectation of privacy to B, i.e., allowed

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[24] *See Duran*, 957 F.2d at 504 (finding that "privacy interests, and the relinquishment thereof, also play prominently" when explaining the notion of common authority in third party consent cases). Relying solely on the words "joint access or control for most purposes" can be misleading, because it directs our focus solely to the third party's independent control of premises, rather than to the defendant's initial decision to open his privacy interest to the third party and thereby grant that individual access and control over those interests. Although a third party's independent control of an area or personal effect can, and does, influence whether that individual has common authority to consent to a search, when a defendant also controls that same area or personal effect, an analysis of his expectation of privacy frequently will be necessary.

mutual or common use of the premises to the extent of joint access and control for most purposes, so that it is reasonably anticipated that B might expose the same privacy interest to others, even including law enforcement officers. To determine here whether and to what extent Shelton actually relinquished his expectation of privacy to Cheryl, we find it helpful to borrow from the well-established "search" standard, by asking whether Shelton showed a subjective expectation of privacy that society is prepared to accept.[25] If the answer is yes, then Cheryl would not have a connection to the premises sufficient to give her common authority to open them to others. Again, we find this approach useful, at least in this case, because it highlights the abandonment-of-privacy rationale that underlies and fundamentally justifies consensual searches. Indeed, our focus on the conduct of the defendant (Shelton), rather than the conduct of the third party (Cheryl), is sensible because it is the defendant's Fourth Amendment rights that are at stake in such situations.[26]

Again, Shelton now insists that after Cheryl moved out, her access to his house was strictly limited to retrieving

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[25] As reiterated in *Kyllo v. United States*, no Fourth Amendment search occurs "unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society [is] willing to recognize that expectation as reasonable." 533 U.S. 27, 33, 150 L. Ed. 2d 94, 121 S. Ct. 2038 (2001) (citations and internal quotation marks omitted).

[26] *See Stoner v. California*, 376 U.S. 483, 489, 11 L. Ed. 2d 856, 84 S. Ct. 889 (1964) (stating that "it is important to bear in mind that it was the [defendant's] constitutional right which was at stake here, and not the night clerk's nor the hotel's"). *See also Katz v. United States*, 389 U.S. 347, 351, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) (finding that "the Fourth Amendment protects people, not places").

her belongings and picking up her mail. In light of all the facts, we disagree. Had he truly wanted to limit her access to these purposes only, Shelton could have revoked Cheryl's security code, changed the locks, and set up an appointment for her to pick up her things while he was present at the house. Just as Shelton put aside Cheryl's mail, he could have collected her personal belongings for her to pick up at one time. He could even have left her mail outside the house or taken it to his office and given it to her sister, who worked there.

Rather than take any of these precautions, however, Shelton did nothing to suggest that Cheryl's access to the house was restricted to the extent that he now contends, or that he had re-established his expectation of privacy vis-a-vis her curtailed use of the house after she moved out. In essence, nothing changed. The great weight of the evidence supports the conclusion that Shelton never altered his position toward Cheryl's use of the house after she moved out, and that his low expectation of privacy relative to her continued unchanged. Having been married to Cheryl and having shared his home with her for at least six years, Shelton never asked her to vacate the house in the first place; she left on her own volition because of his purported marital infidelities. He never filed for separation or divorce; he never changed the locks or revoked Cheryl's personal security code; he was aware that Cheryl returned to the house from time to time, and he sorted her mail for her; he apparently invited her to stay at the house on one occasion when he planned to be out of town; he never changed the locations of incriminating evidence of the bingo operation from the places where they were kept while she was living at the house; and perhaps most importantly Shelton never ceased his efforts to involve her

in the alleged skimming operation even five months after she moved out. Thus, contrary to the magistrate judge's conclusion, there is practically no evidence in the record that Shelton tried to restrict Cheryl's access to the house or to limit the reasons for which she could enter it. By continuing to allow Cheryl free access to the house, and by continuing to involve her in the skimming operation, Shelton demonstrated that he held no subjective expectation of privacy toward her at any time, either before or after her move.

Neither was Shelton's expectation that Cheryl would keep the bingo operation materials private reasonable. "It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities. . . . "[27] Although Shelton might have expected that, for her own best interests, Cheryl would not divulge information or evidence about their illegal activities, the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[28] Indeed, as an accused philanderer, Shelton might have done well to heed the admonition of the playwright William Congreve regarding a woman scorned.[29]

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[27] *United States v. Jacobsen,* 466 U.S. 109, 117, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984).

[28] *Hoffa v. United States,* 385 U.S. 293, 302, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966). *See also Jacobsen,* 466 U.S. at 117.

[29] William Congreve, *The Mourning Bride,* act 3, sc. 8 (1697) ("Heaven has no rage like love to hatred turned, Nor hell a fury like a woman scorned").

Even though the cases from which these principles derive concerned whether the police conduct at issue implicated the Fourth Amendment at all, rather than whether the police violated an established Fourth Amendment right, they nonetheless support the conclusion that Shelton could not reasonably expect Cheryl to keep the bingo operation materials in confidence. Like the defendants who exposed their illegal conduct to government informants in these earlier cases, Shelton voluntarily enlisted Cheryl in the illegal skimming operation by having her alter the bingo session sheets and by having her sign fraudulent tax forms.

In addition, Shelton's proffered belief that Cheryl was only picking up mail and personal belongings on her house visits does not mean that Cheryl's conduct amounted to potentially impermissible trickery or deception.[30] This is not a case in which law enforcement officers gained access to the house by posing as individuals engaging in law-abiding activities, such as a repairman for a utilities company. Rather, Shelton actively involved Cheryl in, and exposed her to, the precise illegal conduct for which the government sought evidence.

Finally, neither Cheryl's principal purpose of procuring evidence for the government instead of picking up

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[30] *See Lewis v. United States,* 385 U.S. 206, 211, 17 L. Ed. 2d 312, 87 S. Ct. 424 (1966) (indicating that not every entry to premises by invitation authorizes "an agent . . . to conduct a general search for incriminating materials"); *Gouled v. United States,* 255 U.S. 298, 306, 65 L. Ed. 647, 41 S. Ct. 261 (1921) (*overruled, in part, on other grounds*) (finding that a search by a government agent who enters a home or office "by stealth, or through social acquaintance, or in the guise of a business call" is prohibited by the Fourth Amendment).

personal belongings, nor the absence of her intention of returning to the marriage even if true precludes our concluding that she maintained common authority, because it is not *her* subjective intention that controls our decision. As discussed above, the validity of third-party consent depends in principal part on the extent to which the defendant forgoes his reasonable expectation of privacy toward that third party. Thus, although the intentions of the third party may carry some weight, it is the defendant's treatment of his own privacy interests that predominates in the determination of the third party's right to consent. Shelton's decision to solicit Cheryl's assistance in the bingo operation, and at the same time to perpetuate her essentially unrestricted access to the house, on par with the access that she had enjoyed while residing there as his spouse, is what vested Cheryl with common authority to consent to a search.

As today we hold that Cheryl possessed common authority to consent to the government's search, i.e., to remove the bingo operation materials from Shelton's house and deliver them to the government, we need not address the issues of limited authority and apparent authority raised by the parties.

III. CONCLUSION

We agree with the district court that Cheryl possessed common authority to consent to a search of Shelton's house. That this manifested itself in her going into that house and taking evidence out of it for the government rather than allowing the government agents to enter the house themselves is of no moment. The result is the same, either way. Shelton's Fourth Amendment rights were not

violated, so the district court's refusal to exclude those items from the evidence was not error. For these reasons, Shelton's conviction on his guilty plea and his resulting sentence are, in all respects,

AFFIRMED.

181 F. Supp. 2d 649

UNITED STATES OF AMERICA VERSUS JIMMY DOUG SHELTON, et al.

CRIMINAL ACTION NO. 1:00CR127-P-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

December 19, 2001, Decided

COUNSEL: For JIMMY DOUG SHELTON, defendant: Jason Lee Shelton, JIMMY D. SHELTON & ASSOCIATES, Jimmy Doug Shelton, Tupelo, MS.

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JUDGES: W. ALLEN PEPPER, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: W. ALLEN PEPPER, JR.

OPINION:

MEMORANDUM OPINION

This cause is before the Court for consideration of the Magistrate judge's Report and Recommendation that the defendant Jimmy Doug Shelton's Motion to Suppress evidence seized by Cheryl Shelton be granted.

The government filed timely objections to the Report and Recommendation. After due consideration of the objections and a de novo review of the record, as well as the parties' initial submissions and the applicable case law, the Court finds as follows, to-wit:

FACTUAL BACKGROUND

This case arises out of an alleged charity bingo skimming operation which, according to the government, was run by the defendant, Jimmy Doug Shelton. Mr. Shelton was indicted on forty-plus counts alleging, *inter alia*, illegal gambling, money laundering and tax fraud in connection with the operation. For purposes of this motion, the relevant facts are, generally, undisputed.

In April, 1997, Cheryl Shelton left her husband, Jimmy Doug Shelton, and the house in which they lived. Upon her departure, she left several personal belongings including clothing, photographs, personal and financial documents, memorabilia, and various items of furniture. Although she was not a co-owner of the house, she retained a key and a security access code for the alarm system.

On May 3, 1997, Cheryl returned to the home with her sister, Debbie Wheeler, and retrieved some of her personal belongings. During this visit, her sister, who had become a cooperating witness since the previous month in

the investigation of Mr. Shelton, videotaped boxes of bingo cards. At the suggestion of her sister, Cheryl, who was an alleged co-conspirator in the skimming operation, decided that she would also cooperate with the government.

On approximately May 5, 1997, Cheryl met with Special Agent Harry Bostick of the IRS and AUSA Charles Spillers and began to cooperate in the criminal investigation of her husband. During this meeting, Cheryl informed the agents of various items of evidence located in the house that could assist in the investigation. The items included bingo cards and a pink notebook on top of a grandfather clock in the entranceway in which Mr. Shelton kept records of the alleged skimming operation. Cheryl turned over to the investigators the videotape that her sister had made during their visit to the house two days earlier. The agents advised Cheryl that they desired her to obtain any evidence of the alleged skimming operation, particularly the pink notebook.

Over the next several months, Cheryl visited the home several times and retrieved evidence that she thought would assist in the investigation. She would also pick up her mail and other personal items during these visits. On some occasions she was accompanied by her daughter. On others, she was accompanied by her sister or Defendant Sue Carnathan.

On May 10, 1997, Cheryl retrieved two pages from the pink notebook and provided them to government agents. The record also reveals the following entries into the home and corresponding evidence obtained:

1. May 22, 1997 – 12 photos of skim records and 3 photos of boxes of bingo cards.

2. May 29, 1997 – 24 photos of boxes of bingo cards, promissory note drawn by Jimmy Doug Shelton to pay Billy Shelton $100,000 in $2,500 monthly payments, handwritten schedule of $97,500 of $2,500/mo. payments, a receipt dated December 3, 1996, showing a $2,500 payment to Billy Shelton, and a typed payment schedule dated November 6, 1995 to October 18, 1996.

3. July 22, 1997 – bingo paper packing slip

4. July 31, 1997 – pink notebook; agents copied the notebook and Cheryl returned it to the top of the grandfather clock.

5. August 1, 1997 – at Sue Carnathan's request, Cheryl accompanied Carnathan to the house so Carnathan could pick up some illegal bingo cards.

6. August 6, 1997 – note signed by Jon Shelton regarding the "exact amount" on the paperwork and bingo session sheets for January 25 and 26, 1997, and February 2, 1997.

7. August 7, 1997 – furnished skim records and envelope of August 1, 1997, skim record to agents who photocopied.

8. August 8, 1997 – volunteer invoice/packing slip dated June 17, 1997, for bingo cards sold to "Bob Harrison."

The record also demonstrates that on at least three occasions, Cheryl Shelton made use of the house to participate in the very skimming operation with regard to which she was removing evidence. On two of these occasions, in September and October of 1997, Cheryl Shelton altered bingo session sheets with the knowledge, and at

the direction, of Mr. Shelton. The defendant was at that time trusting that Cheryl was still a co-conspirator.

At no time did Mr. Shelton attempt to limit Cheryl's access to the home or the evidence in question. Cheryl's key and access code were the same she had always had. Likewise, incriminating evidence was kept in the same locations. Mr. Shelton knew that Cheryl frequented the residence and that the evidence in question was easily accessible to her. However, there is no evidence to indicate that he made any attempt to exclude her. At all relevant times, Cheryl Shelton remained the lawful wife of Jimmy Doug Shelton.

LEGAL ANALYSIS

The issue presented for this Court's consideration is whether Jimmy Doug Shelton's Fourth Amendment rights were violated when the government obtained access to the evidence through the cooperating witness without a warrant. The defendant's principal contention is that Cheryl became an "agent" of the government for Fourth Amendment purposes, and, therefore, could not do what the government investigators themselves could not do. Moreover, according to the defendant, Cheryl Shelton did not have the adequate authority to consent to a search.[1] As a result, the defendant argues, each entry and acquisition of evidence by Cheryl Shelton constituted an unreasonable

[1] The defendant concedes that Cheryl Shelton's consent to cooperate with the government was voluntary. (Def. Supplemental Memorandum at 1).

search in violation of Mr. Shelton's Fourth Amendment rights.

The Fifth Circuit visited a similar set of facts in *United States v. Jenkins,* 46 F.3d 447 (5th Cir. 1995). In *Jenkins* an employee of a distributer [sic] of allegedly obscene videotapes became a cooperating government witness in the criminal investigation of his employer. Over a five week period, the employee allowed the FBI to examine and copy a number of the videotapes that came into his possession. In holding that no Fourth Amendment violation occurred, the court recognized a simple, yet cogent principle: One who possesses the authority to engage in certain conduct before becoming an "agent" of the government may continue to engage in the same conduct without implicating the Fourth Amendment. In the Fifth Circuit's words, "becoming an 'agent' for purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which was authorized prior to entering the agency relationship." *Jenkins,* 46 F.3d at 460. Thus, because the employee maintained the same actual and apparent authority over the videotapes before and after his initial cooperation with the government, his conduct in turning over the disputed materials to the FBI did not violate the Fourth Amendment. The relevant inquiry, therefore, is whether Cheryl Shelton possessed the adequate authority such that she could have consented to a search in her own right which would have yielded the evidence at issue at the time of her agreement with the government. If so, whether or not she became an "agent" of the government is irrelevant because such conduct does not violate the Fourth Amendment. *Id.*

I. Third-Party Consent & Assumption of the Risk

The Fourth Amendment protects against government infringement of a reasonable expectation of privacy. *U.S. v. Jacobsen,* 466 U.S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984). There are two requirements for the existence of a privacy interest protected by the Fourth Amendment: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States,* 389 U.S. 347, 361, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) (Harlan, J., concurring). Thus, a citizen is not protected from every "search," but, only searches that are "unreasonable." *Illinois v. Rodriguez,* 497 U.S. 177, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (1990).

Although warrantless searches are generally prohibited, it is well settled that a search pursuant to consent is not unreasonable for purposes of the Fourth Amendment. *Schneckloth v. Bustamonte,* 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973). Moreover, the authority to consent is not limited to the defendant, but may exist in third parties who possess "common authority" over or other "sufficient relationship" to the premises or effects sought to be inspected. *United States v. Matlock,* 415 U.S. 164, 171, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974).

> The consent of one who possesses common authority or effects is valid against the absent, nonconsenting person with whom that authority is shared. . . . The authority which justifies the third-party consent . . . rests . . . on the mutual use of the property by persons generally having access for most purposes, so that it is reasonable to recognize that any co-inhabitant has the right to permit inspection of his own right and that

> others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S. at 171 n. 7. The hallmarks of third-party consent, then, are common authority or a sufficient relationship to the premises and assumption of the risk. As one court has succinctly stated, the inquiry is a "multi-factored factual question that turns on the access, use, and reasonable expectations of the parties involved." *United States v. Ramirez,* 115 F. Supp.2d 401, 408 n. 14 (S.D.N.Y. 2000) (quoting *United States v. Perez*, 948 F. Supp. 1191, 1200 (S.D.N.Y. 1996)).

Applying these principles, the Court is of the view that the facts in the instant case militate even more heavily against suppression than the scenario in *Jenkins.* Cheryl Shelton enjoyed full and free access to the house at all relevant times. She also retained a key, an alarm access code and personal belongings at the residence. Further, this case involves a spousal relationship, unlike the employer/employee relationship in *Jenkins.* A purview of third-party-consent cases in federal courts reveals that the particular type of relationship becomes important inasmuch as it bears upon the property at issue – that is, inasmuch as it bears upon a "sufficient relationship" to the premises and, in turn, the defendant's reasonable expectation of privacy.[2] Thus, at least one Circuit has employed a presumption that one spouse has the authority to consent to a search of all areas of the homestead. *United States v.*

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[2] It is, therefore, important with respect to the degree to which the defendant assumed the risk that the third party would consent to a search.

Duran, 957 F.2d 499, 505 (7th Cir. 1992). The Seventh Circuit applied the presumption again, this time to a situation where the wife was no longer living at the home, in *United States v. Gevedon,* 214 F.3d 807 (7th Cir. 2000). There, the estranged wife gave consent to authorities to search the marital home and detached garage even though she no longer lived there. According to the court:

> The clear and simple fact is that Jackie was still William's legal wife at the time she consented to the searches. Presumptively, then, she had the actual authority necessary for valid consent. William has not rebutted this presumption.
>
> *Gevedon,* 214 F.3d at 811.

The government need not rely on the implement of a presumption in this instance, however. Certainly an opposite presumption does not exist. The record is clear; the defendant made no attempt whatsoever to limit Cheryl Shelton's access to the house, nor did he attempt to exclude her in any way from the evidence she obtained. Indeed, on at least one occasion, he asked if she would stay the night while he was out of town. On other occasions he had her over specifically to engage in the conduct with regard to which she was collecting evidence. In light of the evidence that Mr. Shelton not only failed to exclude, but even encouraged free access, the Court finds that Cheryl Shelton had actual authority to permit a search "in [her] own right."

Several courts have held that a spouse's consent may be effective even after leaving the marital home. For example, in *United States v. Trzaska,* 859 F.2d 1118 (2d Cir. 1988), the consent of an estranged wife was effective even though she had moved out of the apartment two

weeks earlier. In that case, the wife accompanied the police to the apartment where they conducted a search. While gathering some of her personal belongings, she directed the officers to the location of her husband's weapons. The Court rejected the defendant's arguments that since she no longer lived there she had ceased to have "mutual use" or "common authority" over the premises searched and that her desire to pick up some personal belongings was insufficient evidence of such "mutual use." *Trzaska,* 859 F.2d at 1120. The court pointed to the fact that she had recently moved out, possessed a key to the residence, and did remove some personal belongings as sufficient to establish adequate authority.

Applying the Second Circuit's analysis to this case, Cheryl Shelton had the authority to consent to a search. Like the wife in *Trzaska,* she had also recently moved out and possessed a key. Moreover, she also had a security access code. The evidence demonstrates that, although Cheryl's primary purpose may have been to gather evidence against her husband, she too had her own purposes at the times in question; she picked up some of her personal belongings, checked for phone calls, and gathered her mail.

In a similar case, the Tenth Circuit held an estranged wife's consent effective although she was living with her parents at the time. *United States v. Crouthers,* 669 F.2d 635 (10th Cir. 1982). In so holding, the court noted that she possessed a key and had not completely abandoned the marriage or the apartment. *Crouthers,* 669 F.2d at 643. The same factors are present with regard to Cheryl Shelton.

Although the factual milieu of cases in this area is particularly varied and intensive in nature, the general proposition that is borne out remains constant: a spouse who no longer lives in the marital home may nonetheless retain actual authority to consent to a search where, as here, there is other strong indicia of authority.[3]

The Court concludes, therefore, that the fact Cheryl Shelton was no longer residing at the house did not vitiate her authority to consent to a search in this case. The authority of one who has full access to a property is not diluted by actual non-use. Likewise, neither is that authority limited to certain areas, especially when a spousal relationship is involved. *See, e.g., Gevedon,* 214 F.3d at 811 (estranged wife's consent effective for search of the attic even though she had only entered it once where defendant failed to demonstrate he had excluded her from it); *Duran,*

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[3] For further illustrations of this principle, *see United States v. Brannan,* 898 F.2d 107 (9th Cir. 1990) (wife's consent effective though husband had changed the locks where she was joint owner but from which she had recently moved when husband was arrested); *United States v. Long,* 524 F.2d 660 (9th Cir. 1975) (although wife had moved out because of fear for her safety and husband had changed locks so that her key would not work, wife's consent to search was effective as she "had a joint right to control the house with her husband and in fact exercised that right at the time she accompanied the agents to the house by collecting her personal belongings from the house while the agents were conducting the searches"); *See also State v. Madrid,* 91 N.M. 375, 574 P.2d 594 (App.1978) (relying on *Matlock,* wife who had left home 5 months earlier could still consent where she had a key and had left personal effects there).

The Court notes that none of these cases involved a situation in which the non-consenting spouse facilitated use of the marital home to the consenting spouse in order to advance the alleged criminal enterprise. In this sense, any expectation of privacy Mr. Shelton may have had was even less reasonable.

957 F.2d at 506 (holding that where wife had key and access to a farmhouse which was used solely by her husband as a gym, the fact that she never entered or used the property, nor had any personal effects inside, did not eviscerate the effectiveness of her authority to consent to search).[4] Such reasoning has lead one prominent commentator to conclude that, under the *Matlock* test, the only effective way to prevent a spouse who has full access to the marital home from giving valid consent is for the property to be under the exclusive control of the non-consenting spouse and for the non-consenting spouse to deny access to the consenting spouse. 3 Wayne R. LaFave, *Search and Seizure,* § 8.4(a) at 762 (3d ed. 1996). Neither circumstance is present here with regard to the evidence at issue. The defendant's argument that while Cheryl Shelton may have had free access to the house, she did not have such access, for instance, to the top of the grandfather clock or other areas in which the evidence was located is, therefore, dubious. The facts in the instant case are clearly inconsistent with such a conclusion, not only because areas such as the top of a grandfather clock in the entranceway can hardly be considered "exclusive," but, particularly in light of her participation as a co-conspirator in making the skim records and generating the evidence from the outset.

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[4] *See also, e.g., United States v. Clow,* 26 M.J. 176, 187 (CMA 1988) (applying the same principle where an estranged spouse had left months earlier; "absent a clear showing that one spouse has 'exclusive use' of some area within the marital residence or of some desk, bureau, cupboard, or other piece of furniture located therein . . . a spouse's access to the marital residence should be treated as access to all parts of that residence and to the contents of any furniture or containers located there").

The defendant's attempt to distinguish some of the foregoing authorities on the basis of "ownership," moreover, is unconvincing. While it is true that some courts in third-party consent cases have weighed legal ownership as a factor in the applicable analysis, "ownership is not the *sine qua non* of authority to consent." *Jenkins,* 46 F.3d at 455. The law of property, "with its attendant historical and legal refinements," does not constitute the predicate on which the authority of the third-party consent rests. *Id.* at 455 (citing *Matlock,* 415 U.S. at 171 n. 7).

Indeed, the fact of non-ownership has not precluded valid consent on facts in which the third party's relation to the property is much more tenuous than the circumstances in the instant case. For example, in *U.S. v. Murphy,* 506 F.2d 529 (9th Cir. 1974) (per curiam), an employee granted consent to authorities to search his employer's warehouse. Even though the employee had no status as a lessee of the property, much less an owner, and was given the key to the warehouse only on occasions when he was to perform work there, the court held his consent effective. *Murphy,* 506 F.2d at 529. In so holding, the court reasoned:

> In considering all of the circumstances surrounding the search, we attribute special significance to the fact that Murphy delivered the key to Tucker. We conclude that Tucker's custody of the key gave him sufficient dominion over the premises to enable him to grant the necessary consent. Since Murphy himself put the premises under the immediate and complete control of Tucker, who voluntarily consented to the search, we hold that the search was not unreasonable.

Id. In this case, Cheryl Shelton, likewise a non-owner of the property, but more than a mere employee, not only had a key, but her own alarm code, and unlike the employee in *Murphy,* was not limited by the defendant in her use of the premises. The Court finds that the fact of non-ownership in this instance, viewed in the "totality of the circumstances" did not operate to divest Cheryl Shelton of her authority or "dominion" over the premises.[5]

Nor does the fact that this case involves multiple entries on the part of Cheryl Shelton serve to sufficiently distinguish the case at hand. Again, the inquiry is whether she had authority such that she could have consented in her own right to a search of the premises at the time of the government agreement. Until that authority is vitiated, engaging in activity which she already had the right to engage in does not implicate the Fourth Amendment. Thus, it is irrelevant that the employee in *Jenkins* obtained evidence for the FBI on multiple occasions. He only continued doing that which he had already had the authority to do. Presumably, had that employee been fired or otherwise excluded during the time he was cooperating with authorities, he could not have thereafter gone back and obtained evidence if indeed he was found to be acting as an agent of the government. Only in one of two situations, then, would the inquiry as to whether he became an "agent" of the government become relevant: (1) if he did not possess the authority in the first place to consent to a search at the time he began cooperating; or (2) if he did

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[5] With regard to the particular skimming records at issue, moreover, a claim of ownership on the part of Mr. Shelton as against his co-conspirators, among whom Cheryl Shelton was one, seems problematic.

have that authority at the outset, but somehow lost it and then proceeded to remove evidence anyway.

As in *Jenkins,* neither circumstance is present [sic] the case at hand. At no time during the period in which Cheryl removed evidence from the house can it be said that her authority which existed at the time of her agreement with the government was impaired. No intervening event such as a change of the locks, the taking back of the key and access code, the initiation of a legal proceeding effecting the status of the marriage, or even a communication that free access should no longer be enjoyed – all things easily within power of Mr. Shelton to effect – took place during the period in question.

Instead, the record reveals that Mr. Shelton encouraged the use of the premises during the relevant time period. Indeed, on at least three occasions during this period, Cheryl Shelton made use of the house to participate in the very skimming operation with regard to which she was removing evidence, with the knowledge of Mr. Shelton. On one occasion, in August of 1997, she accompanied defendant Sue Carnathan to the house so Carnathan could pick up some illegal bingo cards. On two more occasions, in September and October of 1997, Cheryl Shelton altered bingo session sheets at Mr. Shelton's direction. These facts exhibit not only continued access to the house, but also free access to the evidence at issue.

By his conduct in permitting such access to the residence as well as the incriminating evidence in question, Mr. Shelton assumed the risk that Cheryl Shelton would cooperate with authorities. In *Hoffa v. United States,* 385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966), the petitioner argued that the failure of the informant to

disclose his role as government informant vitiated the consent the petitioner gave for the informant's access to evidence of criminal wrongdoing. *Hoffa,* 385 U.S. at 300. The Supreme Court rejected the argument because "the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. Therefore, the fact that Mr. Shelton would not have consented to a cooperating witness having access to his house and records of his skimming operation, while "clearly true . . . is a red herring which has no effect on [Cheryl's] actual or apparent authority." *Jenkins,* 46 F.3d at 456. Because Mr. Shelton voluntarily revealed evidence of criminal wrong-doing to Cheryl Shelton, there was no reasonable expectation of privacy to invade.

Cheryl Shelton did not see or hear anything that Mr. Shelton did not either allow or intend for her to see or hear, nor did she overstep her access. Thus, the fact that her entries were gained based on an element of pretext is of no significance. It is well settled that the use of such pretext to gain access to evidence is permissible where, as here, the bounds of that access are not exceeded.[6] As in

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[6] *See, e.g., Lewis v. United States,* 385 U.S. 206, 17 L. Ed. 2d 312, 87 S. Ct. 424 (1966) (No Fourth Amendment violation where agent gained access to defendant's home based on pretext where he stayed within bounds of access provided and disclosed evidence voluntarily revealed); *Jones v. Berry,* 722 F.2d 443 (9th Cir. 1983) (Ruse by IRS to gain access to defendant's skimming records was not a violation of Fourth Amendment where the agents pretended to be fellow criminals in order to gain the confidence of the defendant); *United States v. Schuster,* 684 F.2d 744, 748-49 (11th Cir. 1982) (No Fourth Amendment violation where third-party, who had become agent of the government, allowed Secret Service Agent to accompany him on visit to defendant's

(Continued on following page)

Hoffa, the defendant in this case was not relying on any expectation of privacy when he permitted free access to the house and evidence. Rather, he was relying upon a misplaced confidence that Cheryl would not reveal evidence of the skimming operation. *See Hoffa,* 385 U.S. at 303; *United States v. Tarrant,* 460 F.2d 701, 702 (5th Cir. 1972). In short, Mr. Shelton had no reasonable expectation of privacy vis-a-vis his wife and co-conspirator Cheryl Shelton.

It appears the defendant would have the Court hold otherwise almost purely based on the seemingly surreptitious and deceptive nature of the conduct of Cheryl Shelton. In the defendant's view, such conduct should not be condoned. Indeed, the abuse of trust in this instance, by virtue of the spousal relationship, may exceed those cases where the confidant was merely an employee or friend. The Fourth Amendment, however, makes no such social judgements. For, "however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities." *United States v. White,* 401 U.S. 745, 749, 28 L. Ed. 2d 453, 91 S. Ct 1122 (1971).

II. Apparent Authority

Finally, the Court notes that even if Cheryl Shelton lacked actual authority by virtue of her no longer residing at the house, government investigators were, at minimum,

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apartment where defendant had consented to third party's entry), *reh'g granted,* 697 F.2d 910 (11th Cir. 1983).

reasonable in the belief that she had the actual authority to consent to a search. Therefore, the exclusionary rule should not operate to exclude the evidence at issue. *See Illinois v. Rodriguez,* 497 U.S. 177, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (1990).

Because the Court concludes that Cheryl Shelton possessed the authority to consent to a search at the time of her agreement with the government and throughout the relevant period, the question as to whether she became an agent of the government for Fourth Amendment purposes is irrelevant and the Court need not reach it. Simply put, her conduct did not implicate the Fourth Amendment.

CONCLUSION

Based on the foregoing analysis, the Court respectfully declines to adopt the Honorable Magistrate's recommendation in this instance. Consequently, the defendant's Motion to Suppress the evidence at issue is denied. A separate order in accordance with this opinion will be so entered.

THIS, the 19th day of December, 2001.

W. ALLEN PEPPER, JR.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA — PLAINTIFF

V. — NO. 1:00CR127-P-D

JIMMY DOUG SHELTON, ET AL — DEFENDANT

REPORT AND RECOMMENDATION ON DEFENDANT JIMMY DOUG SHELTON'S MOTION TO SUPPRESS EVIDENCE SEIZED IN THE COURSE OF WARRANTLESS ILLEGAL SEARCH

Defendant Jimmy Doug Shelton has filed a motion to suppress evidence obtained by Shelton's estranged wife Cheryl during several entries to Shelton's home during the period after Cheryl left the martial [sic] home. Cheryl Shelton conducted these searches and seized evidence under the direction and consent of the government and at a time when she was being paid by the government. The undesigned [sic] has conducted an evidentiary hearing on this motion and an oral argument by the attorneys for the parties. During oral argument the government conceded that Cheryl Shelton was acting as a government agent during the questioned searches and seizures. Therefore, this Report and Recommendation will focus on whether Cheryl Shelton had the authority to consent to the searches and seizures.

FACTUAL BACKGROUND

The salient facts underlying this motion are not substantially in dispute. Cheryl Shelton left her husband, Jimmy Doug Shelton, in late April of 1997. When

she left the marital home, she left behind some clothing, photographs, personal and financial documents, memorabilia, and items of furniture.[1] She was not a co-owner of the home.

On or about May 5, 1997, Cheryl met with Special Agent Bostick of the IRS and AUSA Spillars and she began to cooperate with the criminal investigation of her husband. She was granted immunity from prosecution and she was also paid various sums for living expenses. Cheryl retained a key to the home and the access code for the alarm system. In fact, she had returned to the home on May 3, 1997, with her sister, Debbie Wheeler, and retrieved her summer wardrobe and items of jewelry. While there, her sister, who had been cooperating with the government since the previous month, videotaped boxes of bingo cards.

At the initial meeting with the government, Cheryl advised them that there was evidence that would assist the investigation at the house, to include bingo cards and a pink notebook on top of a grandfather clock in which defendant Shelton kept records of the alleged skimming operation. She turned over the videotape that her sister had made on May 5, 1997, and was advised by the agents they would like her to obtain any evidence of

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[1] This is really the only area of factual dispute. Kathy Johnson, who cleaned defendant Shelton's home, testified that she cleaned the home shortly after Cheryl left and that Cheryl had taken all of her belongings except a plastic bag of mildewed clothing which Johnson threw away. However, for the purposes of this motion, the court finds that Cheryl left personal items behind.

the alleged skimming operation, particularly the pink notebook.

Over the coming months, Cheryl entered the home numerous times to ostensibly retrieve personal items. During these visits she would retrieve evidence that she thought would assist in the investigation or evidence she was asked to retrieve by the agents. She would also pick up her mail and other personal items. Sometimes she was accompanied by her daughter, her sister or defendant Sue Carnathan. While government agents knew of these visits, they did not accompany Cheryl into the home.

On May 10, 1997, Cheryl, at the direction of the agents, retrieved two pages from the pink notebook and gave them to the government agents. According to the evidence at the hearing, Cheryl also made the following entries into the home and recovered evidence:

1. May 22, 1997 – 12 photos of skim records and 3 photos of boxes of bingo cards.

2. May 29, 1997 – 24 photos of boxes of bingo cards, promissory note of Jimmy Doug Shelton to pay Billy Shelton $100,000 in $2,500 monthly payments, handwritten schedule of $97,500 of $2,500/mo. payments, a receipt dated 12-3-96 showing a $2,500 payment to Billy Shelton, and a typed payment schedule dated 11-6-95 to 10-18-96.

3. July 22, 1997 – bingo paper packing slip.

4. July 31, 1997 – furnished agents pink notebook; agents copied the notebook and Cheryl returned it to the top of the grandfather clock.

5. August 1, 1997 – at Sue Carnathan's request, Cheryl accompanied Carnathan to the house so that Carnathan could pick up some illegal bingo cards.

6. August 6, 1997 – note signed by John Shelton regarding the "exact amount" on the paperwork and bingo session sheets for 1-25-97, 1-26-97 and 2-2-97.

7. August 7, 1997 – furnished skim records and envelope of 8-1-97 skim record to agents who photocopied.

8. August 8, 1997 – volunteer invoice/packing slip dated 6-17-97 for bingo cards sold to "Bob Harrison."

See, Defense Exhibit 6.

Defendant Shelton did not attempt to limit Cheryl's access to the home and the items taken and turned over to the agents were in areas of the home to which she had free access. On several of the entries into the home, government agents conducted surveillance of the area while Cheryl was in the home. At least twice she gave the agents the pink notebook or related items for immediate copying and return to the home. This was done at the direction of the agents. Although Cheryl may have retrieved personal items on her visits to the house, the undersigned finds that the primary purpose was to retrieve evidence against her husband as directed by the government.

LEGAL CONCLUSIONS AND RECOMMENDATION

The government has conceded that Cheryl Shelton was acting as a government agent when she entered the

marital home on May 10, 1997, and thereafter. The government contends, however, that defendant Shelton's acquiescence to Cheryl's entry into the home coupled with his failure to change the locks and the security code is evidence that he assumed the risk that Cheryl might consent to a search of the premises and that Cheryl had sufficient common authority and joint access to the residence to consent to a search. The government also contends that the government agents were justified on Cheryl's apparent authority to consent to a search and that any evidence seized by Cheryl is admissible whether the court concludes Cheryl was a government agent or not.

Turning first to the question of whether Cheryl was a government agent or not, the undersigned reminds the government that they conceded that point at oral argument. In any event, the undersigned finds that Cheryl Shelton was clearly acting as a government agent when she entered defendant Shelton's home on May 10, 1997, and thereafter. The Fifth Circuit has formulated a two-part test to determine whether a party has become an instrument or agent of the government. First, did the government know or acquiesce in the conduct, and second, did the person performing the search intend to assist law enforcement efforts or assist her own ends? *United States v. Jenkins*, 92 F.3d 430, 460 (5th Cir. 1995), quoting *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982); *see, also, United States v. Dahlstrom*, 180 F.3da 677 (5th Cir. 1999). The answer to both questions is yes. As stated earlier, Cheryl Shelton was acting as a government agent when she entered the home on May 10, 1997, and thereafter.

One of the primary cases relied upon by the government is the previously cited *Jenkins* case. In *Jenkins* an

employee of defendant became a cooperating witness and allowed the FBI to examine certain pornographic videotapes that would come into his possession. This employee was the only one of the defendant's employees in that geographic area who had access to the videotapes. The Fifth Circuit found that the employee had actual authority over the videotapes and that there was no Fourth Amendment violation by allowing the government to copy them. As noted by the court, the defendant had "vested possession [of the videotapes] and almost absolute control" over them to the employee. *Jenkins* at 456. It was uncontradicted that the witness was the sole employee at the facility in Memphis, that he was the intended recipient of the packages shipped to him, that he was authorized to open the packages and extract the videotapes, and that he had sufficient dominion and control over the packages that he could pick them up and carry them away. *Id.*, at 455-56. In *Jenkins*, the court found that the employee had acted within his authority and that it didn't matter whether he was an agent of the government or not. *Jenkins* at 460. The undersigned finds that there are significant differences between this case and the scenario presented by *Jenkins*. First, Cheryl Shelton had no ownership rights in the defendant Shelton's home. Moreover, she had left that home but did have permission to reenter for the purpose of picking up her personal items. There is no evidence that defendant Shelton's permission exceeded that purpose. In fact, every time he was aware Cheryl was in the house it was allegedly for picking up her mail or other personal items. She did not have unfettered permission to do what she wished. The undersigned finds that the principal reason Cheryl entered the house was to obtain evidence for the agents. This is particularly shown by the times the agents placed the area under surveillance while Cheryl

entered, brought out items to be copied, and then returned the items. Picking up mail and personal items was secondary to the primary mission of assisting the government and herself. Defendant Shelton clearly did not consent to a paid government informant entering his home to retrieve other than personal items.

The Supreme Court has stated that a warrantless search of a person's home would be sanctioned if consent was obtained from a third party who had common authority over the premises. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). "Common authority" was defined as "mutual use of the property by persons generally having joint access or control for most purposes." 497 U.S. at 181. The undersigned finds that Cheryl had limited access to the home at best. While she did retain a key and security access code, her stated purpose to enter the home was to retrieve personal items and mail. As noted earlier, she was not a co-owner of the property and the primary mission between May 10, 1997, and August 8, 1997, was to conduct searches on behalf of the government. Other cases relied on by the government in the context of consensual searches do not fit the particular facts of this case. In *United States v. Brannan*, 89 F.2d 108 (9th Cir. 1990) the estranged wife was a co-owner of the property. In *United States v. Trzaska*, 859 F.2d 1120 (2nd Cir. 1988), the estranged wife had recently left the apartment, agents returned with her and searched while she removed her personal items. There were no multiple entries under pretextual reasons. The same scenario was presented in *United States v. Long*, 524 F.2d 660 (9th Cir. 1975).

Similarly, in *United States v. Smith*, 930 F. 2d 1081 (5th Cir. 1991), the court found that although the estranged wife allowed the defendant to occupy the dwelling,

she was the co-lessee and had been granted exclusive use and control of the premises in the divorce proceeding. Such is not the facts in the instant case.

The undersigned will not bother distinguishing the cases relied on by the government further. All involve individuals who could consent to search because they had authority over the premises and joint access and control for most purposes as required by *Illinois v. Rodriguez, Id.* As stated repeatedly, such was not the case in the searches conducted by Cheryl Shelton.

The undersigned respectfully submits that the conduct of the government in these warrantless searches should not be condoned. Cheryl Shelton sought out the government and received immunity for her actions in the alleged skimming operation. She was also paid over $7,000 for cooperation, was relocated to Florida, and afforded protection from the government. While it is convenient to say she was entering the house primarily for her personal items, that premise is simply not supported by the facts. Cheryl Shelton entered the home to retrieve evidence against defendant Shelton and at the direction and acquiescence of the government. Moreover, she did not have the access and control over the premises necessary for a valid consensual search. The government could have obtained a warrant – and they should have. A Fourth Amendment violation occurred on the entries and searches of defendant Shelton's home on May 10, 1997, and thereafter.

Accordingly, it is recommended that the items seized on May 10, 1997, and thereafter by Cheryl Shelton be suppressed and excluded from evidence.

The parties are referred to 28 U.S.C. 636(b)(1) and F.R.Civ.P. 72(b) for the appropriate procedure in the event

any party desires to file objections to these findings and recommendations. Objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging the factual findings on appeal. *United States v. Carrillo-Morales*, 27 F.3d 1054, 1061-62 (5th Cir. 1994), *cert. denied* by *Austin v. United States*, 513 U.S. 1178, 115 S.Ct. 1163, 130 L.Ed.2d 1119 (1995); *Douglass v. United Services Auto, Ass'n*, 70 F.3d 335 (5th Cir. 1995).

Respectfully submitted, this 19th day of November, 2001.

/s/ Jerry A. Davis
UNITED STATES MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
JAN 2 8 2004
OFFICE OF THE CLERK

(3)

No. 03-781

In the Supreme Court of the United States

JIMMY DOUG SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a third party with unrestricted "common authority" over a house may search that house while acting as an agent for the government.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 337 F.3d 529. The opinion of the district court denying petitioner's motion to suppress (Pet. App. 21a-38a) is reported at 181 F. Supp. 2d 649. The report and recommendation of the magistrate judge recommending that the motion to suppress be granted (Pet. App. 39a-47a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2003. A petition for rehearing was denied on August 27, 2003. The petition for a writ of certiorari was filed on November 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Mississippi, petitioner was convicted of filing a false tax return for his bingo operation, Vietnow, Inc., in violation of 26 U.S.C. 7206(2). Gov't C.A. Br. 12; Judgment. The district court sentenced petitioner to nine months of imprisonment to be followed by one year of supervised release and imposed a $20,000 fine. Gov't C.A. Br. 12. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-20a.

1. On April 29, 1997, petitioner's then-wife, Cheryl Shelton, discovered that petitioner was having an affair and abruptly moved out of the home she had shared with him during six years of marriage. Gov't C.A. Br. 3; Pet. App. 2a, 16a. When she left, Cheryl took some of her clothes and personal possessions, but left behind other belongings, including clothes, jewelry, photographs, and furniture. Pet. App. 2a. Although Cheryl was not a co-owner of the house, she retained her house key and personal access code for the security system. *Id.* at 22a. In addition, she visited the house on several occasions with petitioner's knowledge and consent and, at times, at his request. *Id.* at 23a-25a. She and petitioner were not legally separated, and neither party filed for divorce. *Id.* at 2a.

Shortly after Cheryl moved out, her sister, Debbie Wheeler, informed her that the IRS was investigating petitioner and his bingo operation. Debbie Wheeler explained that she was cooperating with the investigation, and she encouraged Cheryl to meet with the government. Pet. App. 2a.

On May 5, Cheryl met with the government and offered to cooperate. Pet. App. 2a; Gov't C.A. Br. 4.

Cheryl informed the government that petitioner had formed Vietnow to skim money from the bingo operation and that she had been involved in the criminal activity. Gov't C.A. Br. 4. She also informed the government that petitioner had not reported income from the operation on their tax returns. *Id.* at 4-5.

In addition, Cheryl told the government about various items kept in the house that might assist the investigation, including illegal bingo cards and records documenting the skimming. Pet. App. 3a. The government told Cheryl that it would be interested in the skimming records and other items relevant to the investigation. *Ibid.*

Over the next several months, Cheryl visited the house on a number of occasions, sometimes on her own initiative and sometimes at the direction of the government, to obtain evidence. Pet. App. 3a. She also used the visits to pick up personal belongings and her mail, which she continued to receive at the house and which petitioner collected and kept inside for her. *Ibid.*; Gov't C.A. Br. 3, 6-10. On at least three occasions, Cheryl also came to the house to participate in petitioner's skimming operations, and, once, petitioner asked her if she would stay in the house while he was out of town. Pet. App. 24a-25a; Gov't C.A. Br. 8, 10. At no point did petitioner attempt to limit Cheryl's access to the house, and the evidence she obtained was located in areas to which she had free access. Pet. App. 25a, 42a.

In exchange for her cooperation, the government assured Cheryl that she would not be prosecuted. Pet. App. 3a. The government also paid some of her living expenses during the investigation and helped to relocate her when the investigation concluded. Pet. App. 40a; Gov't C.A. Br. 9-10.

2. In September 2000, a federal grand jury in the Northern District of Mississippi returned a fifty count indictment charging petitioner and three others with, *inter alia*, mail fraud, illegal gambling, money laundering, and tax fraud connected with the bingo operation. Pet. App. 22a; Gov't C.A. Br. 2. Petitioner filed a motion to suppress the evidence seized during nine visits by Cheryl to the house. A magistrate judge recommended that the district court grant the motion to suppress. Pet. App. 39a-47a. "[T]he magistrate judge acknowledged that [petitioner] had made no attempt to limit Cheryl's access to the home, and noted that the items that Cheryl had taken from the home after she moved out were located in areas to which she had free access." *Id.* at 4a. "Emphasizing that Cheryl maintained no ownership interest in the home, however, the magistrate judge concluded that Cheryl's permission from [petitioner] to enter the home, although not limited spacially, was limited functionally to picking up her mail and personal belongings." *Ibid.* Based on Cheryl's having exceeded that limitation, the magistrate judge recommended that the motion to suppress be granted. *Ibid.*

The district court denied the motion to suppress. Pet. App. 21a-38a. Based on the magistrate judge's factual finding that petitioner had neither attempted to limit his wife's access to the home nor attempted in any way to exclude her access to the evidence, the court concluded that Cheryl "had actual common authority to permit a search by agents of the government and to deal directly with the contents of the house." *Id.* at 5a.

After his motion to suppress was denied, petitioner entered into a conditional plea agreement. Pursuant to that agreement, petitioner pleaded guilty to a count of filing a false tax return and consented to forfeiture of

the Vietnow bingo building and $303,719.73. Pet. App. 5a. Petitioner reserved his right to appeal the denial of his motion to suppress. *Ibid.* The court accepted the plea and sentenced petitioner to nine months of imprisonment to be followed by one year of supervised release and imposed a $20,000 fine. *Ibid.*

3. Based on a "close review of the record and * * * analysis of relevant authority," the court of appeals affirmed petitioner's conviction. Pet. App. 1a. The court began by noting that valid consent to a search is a well-established exception to the general rule that the government must have a warrant supported by probable cause before it may search a house. *Id.* at 6a. The court recognized that the constitutionality of the search in this case turns on whether Cheryl Shelton could validly consent to a search of petitioner's house because, "although she did not literally usher government agents into the house so that they could conduct their own search, Cheryl effectively allowed them to search the premises by acting as their agent in collecting and delivering items of evidence for them." *Id.* at 8a. The court noted that, if Cheryl had still been living in the house with her husband at the time of the searches, she would unquestionably have had "common authority" to authorize the searches. *Id.* at 7a. The court therefore focused on whether she relinquished that common authority when she "moved out of the marital residence one week before she agreed to assist the government in its investigation." *Ibid.*

After reviewing a number of cases involving similar but ultimately distinct facts, the court stated that determining whether someone in Cheryl's position has authority to authorize or to conduct a search requires "an intensely fact-specific inquiry and that slight variations in the facts may cause the results to vary."

Pet. App. 12a. Examining "the privacy interests that animate the rule of third party consent," the court concluded that Cheryl's authority to authorize the searches turned on "whether [petitioner] sufficiently relinquished his expectation of privacy to [her], *i.e.*, allowed mutual or common use of the premises to the extent of joint access and control for most purposes, so that it is reasonably anticipated that [she] might expose the same privacy interest to others, even including law enforcement officers." *Id.* at 14a-15a.

In conducting that inquiry, the court rejected petitioner's argument that his wife's access had been "strictly limited to retrieving her belongings and picking up her mail." Pet. App. 15a-16a. Rather, the court concluded, Cheryl enjoyed essentially the same access to the house that she had before she left:

> [Petitioner] never asked her to vacate the house in the first place; she left on her own volition because of his purported marital infidelities. He never filed for separation or divorce; he never changed the locks or revoked Cheryl's personal security code; he was aware that Cheryl returned to the house from time to time, and he sorted her mail for her; he apparently invited her to stay at the house on one occasion when he planned to be out of town; he never changed the locations of incriminating evidence of the bingo operation from places where they were kept while she was living at the house; and perhaps most importantly [petitioner] never ceased his efforts to involve her in the alleged skimming operation even five months after she moved out.

Id. at 16a-17a. Based on those facts, the court concluded that petitioner "held no subjective expectation of privacy toward [his wife] at any time, either before

or after her move." *Id.* at 17a. To the extent that petitioner expected that his wife would keep information and materials about the bingo operation private, that expectation was not reasonable: "It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities." *Ibid.* (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 117 (1984)). The court of appeals therefore held that petitioner's wife had common authority to authorize or conduct a search of the premises. *Id.* at 19a.

ARGUMENT

Petitioner contends that a third party, who in her personal capacity has unrestricted common authority over a house, may not consent to or conduct a search of the premises once she becomes a government agent. See Pet. i, 10-11, 15, 16, 23-25. That claim is not properly before this Court and, in any event, does not warrant this Court's review.

1. On appeal, petitioner's sole contention was that his wife lacked the common authority necessary to authorize or to conduct a search because her access to and authority over the house were "limited to retrieving her belongings and picking up her mail." Pet. App. 15a-16a. See Pet. C.A. Br. 12-50; Pet. C.A. Reply Br. 1-15. Based on an "intensively fact-specific inquiry" (Pet. App. 12a), the court of appeals rejected that claim and concluded that petitioner's wife retained unrestricted, common authority over the house during the period immediately after she moved out. See *id.* at 16a-17a, 19a-20a. The court of appeals' decision is amply supported by the record and, particularly given its fact-bound nature, does not warrant review by this Court.

In this Court, petitioner does not seriously contest that aspect of the court of appeals' decision. Instead, petitioner contends that an individual loses her authority to consent to a government search once she becomes an agent of the government. See Pet. i, 10-11, 15, 16, 23-25. Petitioner did not make that claim in either his opening or reply brief in the court of appeals, and that court did not address it. The claim is therefore not properly preserved for this Court's review. See *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's contention is without support in either precedent or policy. Petitioner cites no case holding that an individual with an *unqualified* right of access to and common authority over property loses her right to consent to a government search of that property if she becomes a government agent. As the court of appeals noted, this Court has made clear that individuals who expose their illegal conduct to another person assume the risk that the other person will provide that information to law enforcement. See Pet. App. 17a (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 117 (1984), and *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966)). That same principle holds true even if the other person is a government agent but the defendant mistakenly believes that the person is acting in a private capacity. See *Lewis* v. *United States*, 385 U.S. 206 (1966). A contrary rule would severely hamper law enforcement. See, *e.g.*, *United States* v. *Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996) ("In essence, Bramble argues that when inviting strangers into his home to engage in illegal activity, he may condition his consent to entry on the strangers' not

being law enforcement officers. As the Supreme Court pointed out in *Lewis*, adoption of such a rule would mean the end of undercover work.").

Thus, although only a few cases have addressed the question directly, those cases have consistently upheld the right of an agent who has common authority over property to consent to or conduct a search of that property. For example, in *United States* v. *Jenkins*, 46 F.3d 447, 459-460 (5th Cir. 1995), the court specifically rejected the argument that a private citizen has no more authority than an FBI agent upon becoming a government agent: "becoming an 'agent' for purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which was authorized prior to entering into the agency relationship." Similarly, the Third Circuit in *United States* v. *West*, 453 F.2d 1351, 1357 (1972), held:

> The mere fact that an agency relationship might have arisen between Trott and the police could not encroach upon the right of Trott to enter and search his own car any more than it could suspend Trott's right to enter and search his own house. If the rule were to the contrary, a criminal could safely hide his contraband in the home or car of any policeman, then move to suppress the evidence when the evidence was subsequently discovered.

See *United States* v. *Williams*, 106 F.3d 1173, 1177 (4th Cir.) (government informant had right to open, or to consent to the opening of, envelopes addressed to him), cert. denied, 522 U.S. 847 (1997); 1 Wayne R. LaFave, *Search and Seizure* § 1.8(b), at 222-223 (3d ed. 1996) ("While it is often said that under these circumstances the private person becomes the 'agent' of the government official, it should not be presumed from this that

the agent inevitably has no more authority than his principal. To take the most obvious case, it is lawful for the agent to conduct a warrantless search of areas under his proper control even though the requesting officer could not do so on his own."). The court of appeals correctly applied that principle here.

2. Petitioner contends (Pet. 10-21) that the court of appeals' decision conflicts with this Court's precedents in three ways. He is incorrect about each.

First, petitioner contends (Pet. 10-15) that the decision below conflicts with this Court's cases holding that governmental searches and seizures are subject to the Fourth Amendment. More specifically, petitioner argues that the court of appeals failed to consider that Cheryl Shelton was acting as a government agent and therefore "began with the flawed premise that the Fourth Amendment does not apply." Pet. 10. Contrary to that contention, the court of appeals expressly and repeatedly noted that Cheryl was acting as a government agent and that the search was therefore subject to the Fourth Amendment. See, *e.g.*, Pet. App. 1a ("[W]e hold that Shelton's Fourth Amendment rights were not violated by admission of evidence obtained for the government by Cheryl as a paid informant."); *id.* at 8a ("Although she did not literally usher government agents into the house so that they could conduct their own search, Cheryl effectively allowed them to search the premises by acting as their agent in collecting and delivering items of evidence for them during the period and at their express direction and control."). If, as petitioner contends, the court of appeals had concluded that the Fourth Amendment did not apply to the search, the court would have had no reason to conduct an extensive and thorough analysis of

Cheryl's authority to consent and petitioner's expectation of privacy. See Pet. App. 1a, 6a-20a.

Second, petitioner mistakenly contends (Pet. 15-16) that the decision below conflicts with this Court's cases requiring that consent to search be voluntary. Petitioner argues that the court of appeals erred by "never consider[ing] the question of whether Cheryl Wheeler's 'consent' to the searches and seizures was *voluntary*." *Id.* at 15. The court of appeals did not address that issue because petitioner "concede[d] that Cheryl Shelton's consent to cooperate with the government was voluntary." Pet. App. 25a n.1. In any event, there is no support for petitioner's contention that consent is necessarily involuntary in "all 'agency relationships' in which the person giving consent is also seeking immunity from prosecution." Pet. 16. Accepting that logic would call into question the legitimacy of well-established practices, including plea agreements and testimony under immunity agreements. Nor is there any basis to conclude that Cheryl Shelton was coerced to cooperate in this case. Indeed, she initiated contact with the government in order to volunteer her assistance. See Pet. App. 2a.

Third, petitioner incorrectly contends (Pet. 16-21) that the decision below is inconsistent with an implied distinction in this Court's third-party consent decisions between someone who has an unrestricted, independent right to use property and someone who, as a guest or visitor, has a derivative and limited right to use the property. Contrary to petitioner's contention, the court of appeals did not hold that a guest or visitor who has limited access to property may consent to a search of that property. Rather, the court of appeals held that petitioner's wife retained "common authority" over and "essentially unrestricted access to the house, on par

with the access that she had enjoyed while residing there as [petitioner's] spouse." Pet. App. 19a. The court rejected petitioner's contention that his wife's access "was limited to retrieving her belongings and picking up her mail." *Id.* at 15a-16a. The court's conclusion that petitioner's wife's common authority over the house authorized her to conduct a search is fully consistent with this Court's precedent. See *United States* v. *Matlock*, 415 U.S. 164, 171 (1974).

3. Petitioner's contention (Pet. 21-23) that the decision below conflicts with decisions of other courts of appeals also lacks merit. Petitioner cites no court of appeals decision supporting his contention that there is a conflict. Moreover, petitioner specifically stated in his brief in the court of appeals that "[t]his is a unique case," and there is no case law directly on point. Pet. C.A. Br. 44-45; see Pet. App. 9a (stating that "we are aware of no case in which a court has confronted essentially identical factual circumstances"). To the extent that other court of appeals cases are relevant, they support the decision of the court of appeals here. See pp. 8-9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U.S.
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No. 03-781

In The Supreme Court of the United States

JIMMY DOUG SHELTON,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Government can obtain valid consent to search a third-party's property from one of its own agents, when that government agent's "common authority" over the property to be searched had been given to her in her capacity as a private citizen.

II.

Whether searches conducted by a private party who is acting as a government agent are subject to the warrant requirement of the Fourth Amendment, when that private party would otherwise have the right to conduct such searches.

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REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioner Jimmy Doug Shelton respectfully submits the following reply to the brief that the United States submitted in opposition to his petition for a writ of certiorari.

ARGUMENT

The Government's opposition is founded on two premises: (1) that Shelton's claim is not properly before the court, because it was not raised in the courts below; and (2) that "in any event [it] does not warrant this Court's review" (Government's Opposition, p. 7). As is demonstrated below, the Government's first premise disregards the record, and essentially "begs the questions" the petition for certiorari raises. The Government's second premise is equally flawed, and trivializes the major constitutional issues at stake in this proceeding.

1. The arguments and issues in the courts below

As was noted in Shelton's petition for certiorari, at footnote 1, Shelton's original motion to suppress raised almost every conceivable ground for suppressing the evidence obtained by Cheryl Wheeler while she was acting as an agent for the government.[1] Among those grounds

[1] In Shelton's petition, footnote 1 provides as follows:

The motion to suppress, and the supplement to it, alleged that the searches, and seizures of evidence, did not fall into any of the exceptions to the warrant requirement of the

(Continued on following page)

were the specific allegations that "Cheryl Shelton, Camille Prather and Debbie Wheeler were paid informants for the Internal Revenue Service and was [*sic*] acting under their direction and control in making those searches and seizures;" and that Cheryl [Shelton] Wheeler "had no actual or apparent authority to consent to a search of the residence of the Defendant. . . . "

Significantly, in his supplemental memorandum in support of his motion to suppress evidence, Shelton wrote:

> The defendant did not give his consent for Cheryl to become a Government agent and search through his house to retrieve specific

---

Fourth Amendment: "(5) At the time of the searches and seizures, Cheryl Shelton, Camille Prather and Debbie Wheeler had no actual or apparent authority to consent to a search of the residence of the Defendant, Jimmy D. Shelton, and the agents of the Internal Revenue Service who directed them to make the searches and seizures were aware that they lacked either actual or apparent authority to do so; (6) The searches and seizures were made without a warrant and without probable cause or authority of law; (7) The searches and seizures did not fall within any of the exceptions of the Fourth Amendment's warrant requirement; (8) There were no exigent circumstances to justify a search without a warrant; (9) The searches and subsequent seizures were unreasonable; (10) The government's conduct in targeting the Defendant, Jimmy D. Shelton, and in having his estranged wife act as a paid informant and surreptiously [*sic*] gain entrance to his house to make unlawful searches and seizures of documents and other items when the government knew that she had neither actual or apparent authority to remove the documents is a violation of due process and is so outside the norms of fundamental fairness that this Court should exercise its supervisory powers to suppress the evidence." *Defendant Jimmy Doug Shelton's Motion to Suppress Evidence Seized in Illegal Search,* pp. 2-3.

> requested items to be turned over to the IRS. If this Court finds that Cheryl had the authority to enter the defendant's home under contrived circumstances and to then search for, and turn over to the Government, items specifically identified by Government agents, then one must ask what would have prevented the agents themselves from going in and conducting the warrantless search themselves? In effect, as the Government has conceded, Cheryl *was* acting as a Government agent. If the IRS agents could not legally conduct the searches and seizures in this case, then, the same rules should apply to the searches and seizures made by Cheryl.
>
> (Supplemental Memorandum in Support of Jimmy Doug Shelton's Motion to Suppress Evidence, p. 5).

[Parenthetically, it should be noted that this is the Supplemental Memorandum relied upon by the district court in its opinion, at f.n. 1 (Pet. App. 25a), wherein the Court wrote: "[t]he defendant concedes that Cheryl Shelton's consent to cooperate with the government was voluntary." As that court recognized, however – but as the Government apparently does not (Government's Opposition, p. 9) – consent to *cooperate* and valid consent to a search are two very different things.]

In his report and recommendation, the magistrate-judge correctly recognized the distinction that Shelton had drawn, indeed that must be drawn between acts performed by the government, and acts performed by an individual. More significantly, the magistrate-judge drew the necessary distinction between consent given *to* a private third party to enter one's home, and the subsequent "transfer" of that consent to the government, to

permit governmental searches, at a time when the third party "transferring" or giving that consent is acting as an agent of the entity to whom consent is being given:

> The undersigned finds that there are significant differences between this case and the scenario presented by [*United States v.*] *Jenkins* [46 F.3d 447 (5th Cir. 1995)]. First, Cheryl Shelton had no ownership rights in the defendant Shelton's home. Moreover, she had left that home but did have permission to reenter for the purpose of picking up her personal items. There is no evidence that defendant Shelton's permission exceeded that purpose. In fact, every time he was aware Cheryl was in the house it was allegedly for picking up her mail or other personal items. She did not have unfettered permission to do what she wished. The undersigned finds that the principal reason Cheryl entered the house was to obtain evidence for the agents. This is particularly shown by the times the agents placed the area under surveillance while Cheryl entered, brought out items to be copied, and then returned the items. Picking up mail and personal items was secondary to the primary mission of assisting the government and herself. **Defendant Shelton clearly did not consent to a paid government informant entering his home to retrieve other than personal items.** (Pet. App. 45-46a).

It is in the *district* court that the constitutional distinctions that must be drawn between private action, and government action, and between consent given *to* a third party, and consent given *by* that third party, were lost – not because those distinctions were not raised, but because the district court relied upon *United States v.*

Jenkins. As noted in Shelton's Petition, *Jenkins* obliterates the distinction between private action and government action. Or, in the words of the district court:

> The Fifth Circuit visited a similar set of facts in *United States v. Jenkins*, 46 F.3d 447 (5th Cir. 1995). * * * In holding that no Fourth Amendment violation occurred, the court recognized a simple, yet cogent principle: **One who possesses the authority to engage in certain conduct before becoming an "agent" of the government may continue to engage in the same conduct without implicating the Fourth Amendment**. In the Fifth Circuit's words, "becoming an 'agent' for purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which was authorized prior to entering the agency relationship." *Jenkins*, 46 F.3d at 460. (emphasis added) (Pet. App. 26a).

On his appeal, Shelton again raised the issues that are presented to this Court. As can be seen from his opening brief, and the summary of the argument contained therein, he again contended that Cheryl Wheeler lacked the authority "to consent to these searches;" that "[he] still retained a reasonable expectation of privacy in his home;" that "[c]onsent is a question of waiver of the reasonable expectation of privacy;" and that "Cheryl [Wheeler] did not have 'common authority,' defined in *Matlock* as 'joint access or control for most purposes,' over the property to make surreptitious entries to purloin documents for the United States Government."

In short, it is only by *restating* the first question presented,[2] and by ignoring significant portions of the record, that the government can now contend that Shelton's first claim is not properly before the Court. Moreover, the Government makes no such claim whatsoever with regard to the second question presented.[3] The petition for certiorari should be granted.

2. Petitioner's claims are worthy of this Court's review

Before addressing the specific arguments made by the government against granting review in this case, it must again be pointed out that what is at issue is an entirely new exception to the warrant requirement of the Fourth Amendment. If the government has its way in this case, its right to conduct warrantless searches will become coextensive with the rights of third parties to conduct such searches, even when that third party is in fact the government. It is difficult to imagine a Fourth Amendment question *more* worthy of review.

---

[2] Contrary to what the government writes, petitioner has never "contend[ed] that an individual loses her authority to consent to a government search once she becomes an agent of the government." Petitioner does contend, however, that the question of whether the government can give itself permission to search the property of a third party is worthy of this Court's review.

[3] That question is as follows:

> Whether searches conducted by a private party who is acting as a government agent are subject to the warrant requirement of the Fourth Amendment, when that private party would otherwise have the right to conduct such searches.

Against the somewhat obvious significance of this issue, the government raises three arguments: (A) that Shelton is mistaken in his argument that the Court of Appeals failed to consider the applicability of the Fourth Amendment; (B) that Shelton erred when he contended that the Court of Appeals never considered the question of whether Cheryl Wheeler's consent to the searches was voluntary; and (C) that Shelton is incorrect in contending that the decision below is inconsistent with this Court's precedent regarding "reasonable expectations of privacy that our society is prepared to recognize." These argument are addressed *seriatim*, below.

A. The Court of Appeals and the Fourth Amendment

When the Government quoted Shelton's brief at page 10 of its brief, it failed to include the entire sentence it argues against. Shelton did *not* write that the Court of Appeals "began with the flawed premise that the Fourth Amendment does not apply," Shelton wrote: "the Court of Appeals began with the flawed premise that the Fourth Amendment does not apply to government action if that action is undertaken in a 'dual capacity,' *i.e.*, if the government agent conducting the search has, or has been given the right, as a private citizen, to be where he or she is." To borrow from Mark Twain, it is the difference between "lightning," and "lightning bug."

And the Court of Appeals did begin with precisely that premise. In the second paragraph of its legal analysis, (Pet. App. 6a) the Court noted that "[v]alid consent to a search is a well-established *exception* to the normal requirement that law enforcement officers must have a

warrant grounded in probable cause before conducting a search" (emphasis added). In short, the Court of Appeals assumed that the exception was available in this case, notwithstanding Cheryl Wheeler's status as a government agent. Then the Court conducted its "extensive and thorough analysis," one which has everything to do with the relationship between Shelton and Cheryl Wheeler, and nothing to do with Fourth Amendment limits on *governmental action*.

B. Cheryl Wheeler's consent

As noted above, in the district court petitioner had conceded that "Cheryl Wheeler's consent to cooperate with the government was voluntary." As was also noted above, consent to cooperate is not synonymous with having the right, or the authority, or the ability, to consent to a search. And to put the matter most bluntly, the Court of Appeals did not consider the question of the voluntariness of Cheryl Wheeler's consent, because it never considered the *full* Fourth Amendment implications of Cheryl Wheeler's status as a government agent.

The government's suggestion that "[a]ccepting [petitioner's] logic would call into question the legitimacy of well-established practices, including plea agreements and testimony under immunity agreements" (Government's Opposition, p. 11), borders on the frivolous. Entering a plea of guilty does not make a defendant a government agent – and neither does testifying under that agreement, or under a separate immunity agreement. Hundreds of defendants do so every day, and very few of them could be seen as "agents." One becomes a government agent when

one begins to act for, and at the direction of the government. That is why Cheryl Wheeler was a government agent, which in turn is why the government should not be allowed to exempt itself from the requirements of the Fourth Amendment in this case.

C. This Court's precedent, and reasonable expectations of privacy

In his petition, Shelton repeatedly noted that the flaw at the heart of the opinion of the Court of Appeals was the Court's failure to draw the necessary distinction between governmental acts, and acts by a private citizen. In its opposition, the government suggests that opinion of the court of appeals is "fully consistent with this Court's precedent" (Government's Opposition, p. 12). It is not. A careful examination of all the relevant cases decided by this Court establishes that not one of them addresses the right of a government agent to "consent to," and thereafter conduct searches of the property of a third party. To the contrary, this Court's decisions have always emphasized one simple principle: that when the government is conducting a search, the Fourth Amendment's warrant requirement is the starting place for all inquiries.

Certiorari should be granted to address the important federal question raised by this proceeding.

CONCLUSION

Wherefore, this Court is urged to grant Jimmy Doug Shelton's petition for a writ of certiorari.

New Orleans, Louisiana, this 18th day of February, 2004.

Respectfully submitted,

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No. 03-781

IN THE

Supreme Court of the United States

JIMMY DOUG SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICUS CURIAE*

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The Louisiana Association of Criminal Defense Lawyers hereby respectfully moves this Court for leave to submit the attached *Amicus Curiae Brief* on behalf of Petitioner in this matter, Jimmy Doug Shelton. *Amicus* is filing this motion because of the rush of the holidays, and other engagements of counsel, counsel has been unable to secure written permission from the Government to participate in this matter as *amicus*.

As more fully explained at pages 1 & 2 of the attached brief, the Louisiana Association of Criminal Defense Lawyers is a non-profit organization organized and operated by the members of the Louisiana State Bar specializing in the defense of criminal cases.

The attached *Amicus Brief* is neither repetitive nor redundant of the arguments raised by Petition in his *Petition*. Instead, the *Amicus Brief* focuses on the privacy issues which, while mentioned in the *Petition*, were not fully illuminated and emphasized in that *Petition*. LACDL believes that this *Amicus Brief* will assist the Court in determining the substantial issues of Constitutional law that weigh in favor of granting Petitioner's request for certiorari.

Accordingly, Louisiana Association of Criminal Defense Lawyers moves this Court to grant it leave to file the attached brief.

Respectfully submitted,

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INTERESTS OF THE AMICUS CURIAE

The Louisiana Association of Criminal Defense Lawyers is a non-profit organization organized and operated by the members of the Louisiana State Bar specializing in the defense of criminal cases.[1] As noted in its literature, membership in the LACDL "means joining your fellow defenders in the struggle for liberty, individual rights, the basic principle of due process, and the fundamental right to a fair trial." Founded in 1975, the organization currently has four hundred (400) members and is devoted primarily to the support and edification of the criminal defense bar in the State of Louisiana.

The LACDL has a significant interest in the granting of the *Petition for Certiorari* filed in this matter by Jimmy Doug Shelton. As noted in the *Petition* filed by Mr. Shelton, the instant case questions the extent to which the Government can conduct "consensual searches" of an individual's home where the party giving consent has no ownership in the property being searched and is estranged from the property by virtue of having terminated the relationship giving him access to the property. Although this inquiry focuses on four (4) lines of this Court's Fourth Amendment jurisprudence, *see Petition for Writ of Certiorari*, there exists no prior decision from this Court conclusively determining the extent to which such consent is effective. The *res nova* nature of this issue in this Court's jurisprudence has created significant confusion amongst the lower courts and requires resolution by this Court. Because any decision of this Court will have watershed ramifications on the extent to which government searches are permitted, and because this Court's consideration of the Fifth Circuit's opinion in the *Shelton* matter

1. This brief has been authored in its entirety by undersigned counsel for the *amicus curiae*. No person or entity, other than the named *amicus* and its counsel, made any monetary contribution to the preparation and submission of this brief.

will have substantial impact on Louisiana criminal practitioners practicing in the Fifth Circuit, LACDL wishes to participate in this matter.

SUMMARY OF THE ARGUMENT

This case presents the question of whether a criminal defendant surrenders his reasonable expectation of privacy to an estranged wife—thus permitting the wife to "consent" to a search by herself and federal agents of a former marital domicile owned and solely occupied by the defendant—where the defendant gives restricted and limited access to that house to the wife for purposes of removing the wife's belongings. The "right of access" test employed by the Fifth Circuit to find consent in this situation valid violates two aspects of the right to privacy—(a) the Fourth Amendment's protection of the sanctity of a man's home; and (b) the right of substantive due process guaranteeing individuals the right to manage their personal relationships free from unwarranted governmental intrusion. The inability of that test to adequately safeguard the rights of criminally-accused defendants becomes manifest when the Court considers the inconsistencies between the Fifth Circuit opinion *sub judice* and the recent Eleventh Circuit opinion in *United States v. Backus*, 349 F.3d 928 (11th Cir. 2003). For these reasons, this Court should accept certiorari and review the decision of the Court below.

The right to privacy has many aspects, *inter alia*, the right to be free of unwarranted intrusion into one's home and the right to manage one's own interpersonal relationships in a manner conforming to one's own personal beliefs. In the instant matter, the Fifth Circuit opinion undermines both of these fundamental rights. It ignores the reasonable expectation of privacy that Jimmy Shelton had in the home solely occupied him, solely owned by him, and from which his wife had irrevocably left weeks before the commencement of the searches

at issue. Compounding this refusal to recognize the sanctity of Shelton's abode, the decision further diminishes Shelton's right to privacy solely because of the manner in which he acted towards his estranged wife, a diminution that violates Shelton's right to freedom from unwarranted intrusion into the interpersonal relationships significant to him. These twin violations arose largely due to the lack of any significant guidance from this Court as to the criteria to be applied in third-party consent cases in which the consenting party is the estranged wife of the accused. They therefore signal a need for this Court to provide some standards for lower courts to follow in such cases.

That this need is acute is demonstrated by the recent Eleventh Circuit decision in *Backus*, *supra*. Significant about the *Backus* decision is the fact that it arrived at a result identical to that in the instant matter by holding that the actions taken by Backus to protect his privacy —actions the Fifth Circuit chided Shelton for not taking—were evidence that Backus had surrendered any expectation of privacy he may have had in his home! That one court could find inaction indicative of a lack of privacy, while another could find that actions gave the same indication, exemplifies the confusion in the lower courts caused by the lack of necessary guidance from this Court. This Court should therefore intervene and enunciate standards sufficient to safeguard the privacy rights embodied in the Fourth, Fifth and Fourteenth Amendments.

ARGUMENT

LACDL intervenes in this matter as *amicus curiae* to underscore the extent to which the decision of the United States Fifth Circuit Court of Appeals in this matter has eviscerated the right of privacy undergirding the Fourth Amendment's prohibition against unreasonable searches and seizures. Reaching its decision in the instant case, the Fifth Circuit held that the limited rights of access to his house that Jimmy Doug Shelton gave to his estranged wife eliminated any expectation of privacy he might have had in that house, a house searched by the Government through the consent and with the assistance of Shelton's estranged wife Cheryl. *United States v. Shelton*, 337 F.3d 529, 536-37 (5th Cir. 2003). This holding implicates two (2) significant aspects of the right to privacy—the right of an individual to maintain a degree of privacy in his or her home and the right of individuals to conduct their personal lives and personal relationships with a veil of privacy untarnished by state action. Because the decision of the Fifth Circuit treats the privacy issue in a manner inconsistent with prior jurisprudence, and does so in a fashion that undermines the substantial privacy interests supporting the Fourth Amendment's exclusionary rule, this Court should grant certiorari and review the decision of the Fifth Circuit.

I. THIS CASE PRESENTS SIGNIFICANT ISSUES OF CONSTITUTIONAL LAW CONCERNING THE SCOPE OF THE RIGHT TO PRIVACY.

Although it comes to this Court in the context of a criminal case, the instant matter raises substantial issues of constitutional law concerning the extent to which the right of privacy protects a person's interests in his home and in the interpersonal relationships significant to that person's life. This Court has previously recognized the fundamental nature of this right of

privacy. *See generally Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 926-27 (1992); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) ("This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.") The essential question raised by the Fifth Circuit opinion in this case is whether or not Jimmy Doug Shelton surrendered the privacy interest he possessed in a home solely owned and occupied by him when he granted his estranged wife limited access to the home, access granted for the limited purpose of eliminating the material ties that bound him to her. The decision reached by the Fifth Circuit in the instant case undermines both the right of privacy Shelton possessed in the sanctity of his home and the right of privacy Shelton possessed in his ability to sever his relationship with his estranged wife in a manner free from governmental oversight or intrusion. This Court should now review that decision and articulate clear standards that will safeguard against future intrusions on the fundamental right to privacy.

A. *The Fifth Circuit decision undermines that aspect of the right to privacy that safeguards the sanctity of the home.*

Fundamental to the right to privacy is the privacy interest that a person maintains in residences solely owned and occupied by them. This Court has previously recognized "the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed." *Payton v. New York*, 445 U.S. 573, 582 (1980). The lower court decision in the instant matter fails to adhere to standards sufficient to circumscribe that governmental intrusion and is therefore inconsistent with the fundamental nature of the right to privacy in the home.

The Fourth Amendment recognizes that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. As a means of safeguarding this freedom, "the exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). The exclusionary rule permits individuals whose property or person has been subject to an unreasonable search and seizure the ability to demand the exclusion at trial or sentencing of any and all evidence unlawfully obtained through the unreasonable search. *See generally Weeks v. United States*, 232 U.S. 383, 398 (1914). Thus "the trial right of the exclusionary rule, where it applies, is that no evidence seized in violation of the Fourth Amendment will be introduced at his trial unless he consents." *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990). To permit otherwise would be to reward law enforcement for the violation of fundamental rights of privacy underlying the Fourth Amendment.

Although the exclusionary rule has been limited to searches and seizures occurring in instances and locations in which a person has a "reasonable expectation of privacy", *see Katz v. United States*, 389 U.S. 347, 351 (1967), this Court has previously recognized that the "reasonable expectation of privacy" reaches its zenith within the confines of a person's domicile. "For this reason, warrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978). The reasonableness of this expectation of privacy derives from the high regard in which this Court has placed the sanctity of a person's home in permitting the exclusion of individuals

except upon the express wish of the homeowner. "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). *See also Wilson v. Layne*, 526 U.S. 603, 610-11 (1999) ("the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic meant that absent a warrant or exigent circumstances, police could not enter a home to make an arrest"); *Silverman v. United States*, 365 U.S. 505, 512 (1961) ("A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.") Therefore, once a man has retreated into his home and signaled his intent to exclude others from complete access to that home, the right to privacy respects that decision and precludes the government from taking actions in violation of that right.

To find a valid surrender of that fundamental right of privacy requires a showing by the government that the owner of a dwelling somehow abdicated his right to exclude others from his home and in effect gave them joint authority to make decisions relative to that home. "As we stated in *Matlock, supra*, common authority rests on mutual use of the property by persons generally having joint access or control for most purposes. The burden of establishing that common authority rests upon the State." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). Common authority extends beyond simple property ownership, but it retains in essential part the requirement that the owner of the property in question have surrendered his or her unilateral right to control and use of the property being searched. The presence of common authority exists in the presence of

> mutual use of the property by persons *generally having joint access or control for most purposes*, so

> that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 172 (1974) (emphasis added). Because of the substantial constitutional rights involved, the burden on the government of proving common authority is rigorous, and cannot be satisfied absent a showing that a person had a virtually blank mandate to enter an abode at will and make decisions relative to the property.

By focusing on the consent given by Mrs. Shelton to the searches at issue in the instant case, the Fifth Circuit placed a burden of proof on the Government insufficient to safeguard the constitutional privacy protections contained in the Fourth Amendment. No evidence was presented to show that Mr. Shelton gave Mrs. Shelton permission to enter his home for any purposes other than the retrieval of her mail and the removal of her personal possessions from the home. This limitation on Mrs. Shelton's access rights falls far short of the requirement that she have "control for most purposes" over the house and enjoy completely unfettered "joint" access to that house. Mr. Shelton had expressly limited the ability of Mrs. Shelton to conduct free-ranging excursions into his home. He had therefore erected a barrier between Mrs. Shelton and that home sufficient to create a zone of privacy that Mrs. Shelton and the government were required to respect.

Instead, the Government used Mrs. Shelton's "consent" to a search of the premises to discover and collect evidence through methods wholly unrelated to the authority Mrs. Shelton had with respect to the house. Mrs. Shelton accompanied the Government agents through Mr. Shelton's house and showed them a number of hiding places used by Mr. Shelton to store personal,

confidential documents that he intended to keep from the general public. Mrs. Shelton indeed videotaped portions of the house where the Government collected evidence and did herself conduct an extensive search of the premises to aid the Government in collecting evidence to be used against Mr. Shelton. None of these activities bore any relation to the limited retrieval and removal authority granted Mrs. Shelton. They do not fit within the limited authority given to Mrs. Shelton to enter Mr. Shelton's house. Because the Government's right to search is derivative of the authority granted to Mrs. Shelton, and Mrs. Shelton had no authority to enter Mr. Shelton's home for any purpose other than the retrieval of mail and personal belongings, the Government had no right to search the home.

By equating the limited rights of access given to Mrs. Shelton with "joint access or control for all purposes", the Fifth Circuit imposed an insufficiently heavy burden of proof on the Government to show the consensual nature of the search. That unduly lax standard undermines the conceded privacy interests Mr. Shelton attempted to carve out in the matrimonial domicile solely owned and solely occupied by him. This Court should grant certiorari in this matter to insure that future analyses of the consent requirement comport with the strong protection of the right to privacy inherent in this Court's prior precedent.

B. *The Fifth Circuit decision is inconsistent with this Court's precedent concerning the right to privacy as it exists in interpersonal relationships.*

Although the focus of the Fourth Amendment centers on the right to privacy as it exists in the home, the instant case also presents concerns over the right to privacy as it exists in interpersonal relationships. The Fifth Circuit found Shelton to have yielded his right to privacy to his estranged wife based on the manner in which he acted towards her after she left the matrimonial home. Using this conduct as a basis for determining

the constitutional rights afforded Shelton seriously infringes on the right to privacy he has in regards to his family and the dissolution of his marital relationship. Because that infringement is inconsistent with this Court's protection of the family relationship, this Court should accept review of this matter to remedy that inconsistency.

This Court has often recognized that the rights guaranteed by the Fourteenth Amendment's incorporation of the Fifth Amendment's right to due process include the right "to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925). The Court has further delineated that such freedoms fall within the ambit of the right to privacy necessary for the preservation of ordered liberty under the Constitution. "We recently referred in *Mapp v. Ohio*, 367 U.S. 643, 656, 81 S. Ct. 1684, 1692, 6 L. Ed. 2d 1081, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'" *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Although *Griswold* categorized the right to privacy as "penumbral", subsequent precedent from this Court delineates that the right—especially as applied to interpersonal and familial relationships—is fundamental. *See generally Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 926-27 (1992) ("Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, child rearing, marriage, and contraceptive choice.") The Court has extended this right to encompass the

right of indigents to obtain a divorce, *see Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) ("in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship"); the right of women to obtain abortions without undue burden on that right, *see Roe v. Wade*, 410 U.S. 113, 153 (1973), and—most recently; the right of homosexuals to engage in sexual conduct in the privacy of their own home. *See Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.") These decisions establish the rule that, in the context of an adult's most fundamental relationships with fellow adults—whether those relationships be traditional or non-traditional—the government has no right to dictate a specific course of conduct in those relationships absent a violation of a valid law supported by a compelling state interest.

This Court enunciated the policy behind this dictate in *Casey*, *supra*. Observing the necessity of free communication and independent undertaking as to individual relationships, the *Casey* Court found that:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Casey, 505 U.S. at 851. *Accord Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984) ("Without precisely identifying every

consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs"); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.") Just as the right to enter into marriage is considered fundamental, so the right to exit a marriage no longer considered viable is considered to be one of the areas of human endeavor into which the government should not intrude.

> Because one has a fundamental right to marry, *see Zablocki*, 434 U.S. at 386, 98 S. Ct. 673, which includes the right to divorce so that one can remarry, *see Boddie*, 401 U.S. at 376, 91 S. Ct. 780, a statute whose only purpose is to hinder this right, even if it does not actually, in its effect, 'interfere directly and substantially with the right to marry,' *Zablocki*, 434 U.S. at 387, 98 S. Ct. 673, would not be supported by a legitimate government purpose.

Aleman v. Glickman, 217 F.3d 1191, 1204 (9th Cir. 2000). The marital relationship is so basic and personal that the government cannot place undue burdens on the entry into, conduct in and exit from the relationship, absent a compelling governmental interest.

The Fifth Circuit decision in the instant matter is inconsistent with this stated policy. In the instant case, the lower court calculated the "reasonable expectation of privacy" afforded Shelton in his marital home based on the means by which he chose to end his relationship with his wife, Cheryl. *See Shelton*, 337 F.3d at 537. It came up with a hypothetical list of actions it

deemed a prudent spouse would take if his wife left him and determined that, because the actions taken by Shelton in the wake of his wife's departure did not conform to that list, he would be afforded a lesser standard of privacy than individuals whose actions did so conform. The "right of access" test that emerged from this comparison hinged on whether Shelton acted towards his estranged wife in a manner consistent with that which the court believed a spurned husband should act. *See, e.g., id.* ("Indeed, as an accused philanderer, Shelton might have done well to heed the admonition of the playwright William Congreve regarding a woman scorned.") Yet this list of action items failed to take into account the very intimate and personal details of the specific relationship between Shelton and his wife, it failed to discern whether or not the actions taken by Shelton were appropriate given the context of that relationship, and it failed to take into account the right of the Sheltons to separate in the way most appropriate to their personal beliefs and ideals. Society cannot enforce conformity in the context of an interpersonal relationship and cannot hinge a party's constitutional freedoms on the extent to which that party conforms to a specific beliefs system. *Compare, e.g., Lawrence*, 123 S. Ct. at 2472

> Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.

To do so would violate the substantive due process concerns, rooted in the guarantees of privacy of the Fifth and Fourteenth Amendments, so essential to the concept of ordered liberty.

In the instant case, the Fifth Circuit limited Shelton's rights to privacy based solely on the extent to which the breakup of his marriage conformed to what the court viewed to be accepted societal beliefs. Yet the court cannot enforce its views as to how Shelton should have acted towards his ex-wife absent either a compelling governmental interest or some evidence showing that his conduct towards his ex-wife violates valid state or federal law. *See Casey*, 505 U.S. at 929; *California v. Ciraolo*, 476 U.S. 207, *226 n.11 (1986) (While "the right of privacy in the home and its curtilage includes no right to engage in unlawful conduct there", the Fourth Amendment requires a warrant to intrude on that privacy). Neither has been demonstrated in the case *sub judice*. Therefore, the Fifth Circuit improperly intruded into the personal and private relationship between Shelton and his wife to determine the extent of his right to privacy in their marital domicile, a method of adjudication impermissible under the Fifth and Fourteenth Amendments.

II. THE DECISION OF THE FIFTH CIRCUIT CREATES A CIRCUIT SPLIT REQUIRING RESOLUTION BY THIS COURT.

That the "right of access" test adopted by the Fifth Circuit is unworkable, and is insufficiently vigorous to protect the right to privacy as intended by the Framers, becomes pellucidly clear when compared with the subsequent decision of the Eleventh Circuit in *United States v. Backus*, 349 F.3d 1298 (11th Cir. 2003). While the Fifth Circuit in the instant case found that Shelton failed to properly safeguard his home from intrusion by Cheryl, the Eleventh Circuit in *Backus* found that Backus had surrendered his expectation of privacy because he took many of the actions the Fifth Circuit chastised Shelton for not taking! That two courts could reach such inconsistent results exemplifies the unworkability of the standards currently used to measure for the reasonable expectation of privacy a criminal defendant

has in his home. Resolution of the confusion created by this lack of standards requires this Court's intervention.

In *Shelton*, the Fifth Circuit noted that "the only rule that emerges [from cases involving third-party consent to search] is that the validity of a search grounded in third-party consent requires an intensely fact-specific inquiry, and that slight variations in the facts may cause the results to vary." *Shelton*, 337 F.3d 529, 535 (5th Cir. 2003). Taking this lack of bright-line rules as an invitation to fashion its own criteria based on the facts before it, the lower court began with the notion that "third party consent presumably extends the capacity to give consent to individuals to whom the one with the privacy interest has already substantially ceded his expectation of privacy." *Id.* at 535. The court then found that Shelton had failed to take certain precautions against intrusion and had thus ceded his expectation of privacy to Cheryl:

> Had he truly wanted to limit her access to these purposes only, Shelton could have revoked Cheryl's security code, changed the locks, and set up an appointment for her to pick up her things while he was present at the house. Just as Shelton put aside Cheryl's mail, he could have collected her personal belongings for her to pick up at one time. He could even have left her mail outside the house or taken it to his office and given it to her sister, who worked there.

Id. at 536-37. Finding that Shelton took none of these precautions, the court held that "Shelton never altered his position toward Cheryl's use of the house after she moved out, and that his low expectation of privacy relative to her continued unchanged." *Id.* at 537. This finding permitted it to condone at least nine (9) searches of Shelton's house by Cheryl Shelton, and seizures of evidence from that house, all at the behest and

under the direction of the Government. The primary purpose of the visits was to further the Government's criminal investigation. The lower court permitted these searches and seizures based on its belief that Shelton's failure to take the actions enunciated in the opinion showed that he had ceded any privacy expectation he might have in the domicile solely owned and occupied by him to his estranged wife.

Yet the undertaking of those very actions to safeguard one's privacy can themselves be taken as indicia of a low expectation of privacy in the property subject to the actions. The Eleventh Circuit's decision in *Backus* amply demonstrates this fact. In *Backus*, the defendant husband—a convicted felon—had abused his wife for many years and that abuse ultimately led her to flee the marital domicile. *Backus*, 349 F.3d at 1300-01. Although Backus changed the locks on the marital domicile after his wife left, he continued to write her to demand that she return, and he left her as co-owner of the house occupied by the couple during their marriage. *Id.* at 1303. Six months after her departure from the marital domicile, Mrs. Backus contacted ATF agents and led them to the house, consented to a search of its contents, and accompanied the officers on a search that yielded four (4) weapons and 4,000 rounds of ammunition. *Id.* Charged with illegal possession of a firearm while a convicted felon, Backus argued on appeal that his wife's lengthy absence from the marital home made it reasonable for him to expect that she would never return, thus giving him a reasonable expectation of privacy in the home. *Id.* The Eleventh Circuit found that Backus possessed no expectation of privacy in the home *vis-à-vis* his wife because he had taken many of the actions that the Fifth Circuit chided Shelton for *not* taking!

> On a more factual note, if Backus truly did not expect his wife to return, it is hard to understand why he would have felt it necessary to change the deadbolt

> lock on the door to prevent her key from working in it. Moreover, in the letters Backus sent to his wife through her family near the end of the six-month period, he was still insisting that she return, albeit in his usual less than diplomatic terms: "You had better get your ass over here and help;" "Don't fear knocking on my door, fear what's coming if you don't;" and "I am going to do something if you don't get your ass over here & grow the fuck up." The point here is that it is not clear that Backus did not expect his wife to return and exert authority over their jointly owned townhouse, but it is clear that any expectation he may have had that she would never do so was an unreasonable one. In the language of the Supreme Court's *Matlock* decision, given the circumstances it is "reasonable to recognize" that Mrs. Backus had "the right to permit the inspection in [her] own right" and that her husband "assumed the risk" that she might permit the townhouse to be searched.

Id. at 1304. Ironically, the Eleventh Circuit cited *Shelton* as "support" for its belief that Backus' actions relative to his home and his wife showed that he lacked a reasonable expectation of privacy in his home. *Id.* at 1305. Given that the two (2) cases reached the same result by interpreting facts in a manner diametrically opposed to one another, the fact that the Eleventh Circuit could find its decision in harmony with that of *Shelton* demonstrates the failure of contemporary standards for third-party consent to provide courts with adequate criteria for measuring the reasonableness of a search based on the existence of third-party consent by an estranged wife.

The diametric opposition of these two (2) cases becomes apparent when one considers the facts highlighted by the two (2) courts for determining whether the defendants in *Backus* and *Shelton* had ceded their expectation of privacy in their homes to their estranged wives. In *Shelton*, the Fifth Circuit held that the failure to change the locks on the house or to revoke Mrs. Shelton's security code showed a failure to safeguard the premises against intrusion—the Eleventh Circuit in *Backus* found that the changing of the locks showed an expectation that the wife would return. Shelton strictly restricted the activities for which his wife could return, yet Backus demanded that his wife return unconditionally—in both instances, the courts found that the defendant "held no subjective expectation of privacy toward her at any time, either before or after her move." *Shelton*, 337 F.3d at 537. *Compare*, *Backus*, 349 F.3d at 1304. Although Shelton's wife had been gone but a few when his wife began leading FBI agents to his home, and Backus' wife had been gone six (6) months, the Eleventh Circuit found any distinction based on time to be irrelevant. *Backus*, 349 F.3d at 1305 ("One month or six, Mrs. Backus still had enough common authority over or sufficient relationship to the premises to consent to a search of it.") The only clear rule arising from these cases, if such it can be characterized, is that the "fact-specific" criteria used for determining the reasonableness of third-party consent to search depends less on the facts presented than on the *gestalt* reaction of individual courts to those facts.

If left without guidance, the decisions of the lower courts will erode the right of privacy in a manner inconsistent with its Constitutional origin. The logistical breakdown of the lower court system in evaluating the reasonableness of third-party consent in cases involving estranged spouses or partners lies in the attempt by lower courts to place a mathematical matrix over individual conduct and to determine whether or not that conduct

safeguarded the privacy an individual defendant expects in his home. The right to privacy simply does not work this way—because the right is so personal, and its application in interpersonal relationships cannot be confined to a specific yardstick, the Government's proper office is to avoid situations where it must pass judgment on an individual's actions in relation to his spouse, partner or family. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 385 (1978) ("While the outer limits of the right of personal privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships and child rearing and education"); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.") The decision reached by the Fifth Circuit in the instant matter determines the amount of constitutional rights a criminal defendant has based on the manner in which that defendant treats the breakup of his relationship with his spouse. It therefore measures a criminal defendant's right to privacy by passing judgment on the interpersonal relationship extant between the defendant and his spouse. Such action intrudes on a portion of private conduct in a manner wholly inconsistent with the Framer's intent in creating the implicit, albeit fundamental, constitutional right of privacy. This Court should therefore intervene in this action and create standards that more vigorously shield defendants like Shelton and Backus from unwarranted intrusions into their personal relationships by government investigation.

CONCLUSION

For the foregoing reasons, and for those expressed in the *Petition for Certiorari* filed in this matter, the Louisiana Association of Criminal Defense Lawyers moves this Court to grant Jimmy Doug Shelton's *Petition*.

Respectfully submitted,

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